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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 In re Terrorist Attacks on  
4 September 11, 2001

03 MD 1570 (GBD)

5 -----x  
6 New York, N.Y.  
7 July 30, 2015  
8 11:00 a.m.

9 Before:

HON. GEORGE B. DANIELS,

District Judge

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11  
12  
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1 (Case called)

2 THE COURT: Good morning, everyone. I know the court  
3 reporter has the appearance sheet and a seating chart. This is  
4 the way I'd like to proceed today. First of all, I understand  
5 from speaking with Magistrate Judge Maas there are no issues  
6 for him to address today, so I don't think he's expecting to  
7 see you this afternoon.

8 With regard to the motions that are outstanding, this  
9 is what I'd like to do. Let me go to the Hoglan motion for  
10 default. I think it would be useful to go through the same  
11 process, the same evidentiary hearing that we went through with  
12 the Havlish default motion. Basically, I have the voluminous  
13 papers, evidentiary documents that were submitted in support of  
14 the motion, but I think it would be useful to have the  
15 plaintiffs come in and summarize for the record the nature of  
16 that evidence, so there will be a clear record, and highlight  
17 the issues and the facts on which I need to make  
18 determinations. I'd like to do that, if possible, on August  
19 17, at 10:30.

20 Mr. Lee? Who signed in for the Hoglan plaintiffs? I  
21 thought it was David Lee.

22 MR. HAILEY: Rich Hailey, your Honor, for Havlish.

23 THE COURT: OK. I'm sorry.

24 MR. LEE: I'm David Lee, your Honor.

25 THE COURT: I assume your firm and your offices are

1 going to be in a position to do that. Is that date sufficient  
2 for your purposes?

3 MR. HAILEY: Yes.

4 THE COURT: Let's plan on doing that. I've already  
5 started to review your submission and I'd be prepared to hear  
6 you on that date and I'll discuss it further if I have any  
7 questions and then immediately move forward to determine that  
8 motion.

9 MR. HAILEY: Your Honor, just for clarification, I  
10 assume you're referring to the Hoglan case.

11 THE COURT: Yes, Hoglan.

12 MR. HAILEY: Thank you very much.

13 THE COURT: Let me put that aside. Also, there is an  
14 outstanding motion, al-Swailem. Who is representing that  
15 defendant?

16 MR. KABAT: I am, your Honor.

17 THE COURT: I'm working on a draft now of the decision  
18 in that case and I'm preparing to issue a decision sometime  
19 between now and the August 17 date. I should get you a  
20 decision on that within that time period.

21 What I'd like to do is hear the parties on any other  
22 issues that we can address either now or after argument on the  
23 latest motion that categorizes the issues of sovereign  
24 immunity. I'd like to hear from the parties on that. I think  
25 it's reasonable to expect that within the next 60 to 90 days, I

1 can go ahead and resolve that, given the nature of what's been  
2 submitted. I know that we can discuss the further averments  
3 that have been submitted. I think there's a 100-page  
4 submission, several hundred paragraphs. We'll discuss that in  
5 the context of the motion and then I'll be prepared to resolve  
6 that motion in that period of time.

7 Before I hear, and I guess I should hear first from  
8 the defendants on that motion, is there anything we should  
9 address or raise, any other issue that we can quickly put aside  
10 before we go through the motions?

11 MR. KREINDLER: Good morning, your Honor. First let  
12 me say today a number of the family members of some of the  
13 people who were killed on 9/11 are here, including John and  
14 Kathy Ashton, whose names you've read thousands of times.  
15 They've been here through some of the first conferences with  
16 Judge Schwartz and then Judge Casey and then with your Honor,  
17 and I just wanted to take not more than a minute to kind of  
18 introduce them *en masse* to your Honor. And I don't want to  
19 take any time now, but when oral argument is done, if your  
20 Honor would permit three to five minutes on what we're doing  
21 with Iran and what we see coming up in the next few months, I  
22 think that would be helpful. But I don't want to delay the  
23 main event. Sean Carter is going to be arguing for us.

24 THE COURT: Yes.

25 MR. KELLOGG: Good morning, your Honor. Michael

1 Kellogg, on behalf of the Kingdom of Saudi Arabia. Roy Englert  
2 is also here on behalf of the Saudi High Commission. He'll be  
3 available if the Court has any specific questions about the  
4 Saudi High Commission or if there's rebuttal. Otherwise, I  
5 would like to set aside the Saudi High Commission at the  
6 outset. That agency is in exactly the same posture as the  
7 Saudi Joint Relief Commission and the Saudi Red Crescent, both  
8 of which instrumentalities of the kingdom were dismissed by  
9 this COURT and their dismissals were affirmed by the Second  
10 Circuit under the whole tort doctrine under which they have to  
11 have committed a tort in the United States.

12 Like the Saudi Joint Relief Commission and the Saudi  
13 Red Crescent, the Saudi High Commission operated wholly outside  
14 the United States. They were formed to assist the victims of  
15 the Serbian genocide in Bosnia-Herzegovina. Having completed  
16 that mission, the agency no longer exists, but it never  
17 operated inside the United States and the plaintiffs have made  
18 no attempt to suggest or prove otherwise. Their only  
19 contention is that the Second Circuit is wrong on the whole  
20 tort doctrine, which is obviously not a cognizable issue before  
21 this Court. So the Saudi High Commission is clearly out and I  
22 want to focus my attention this morning on the allegations  
23 against the kingdom and explain why they, too, must be  
24 dismissed again as Judge Casey did, I guess it's nine years ago  
25 now.

1           The plaintiffs brought this case in 2003. Their claim  
2           is that the Kingdom of Saudi Arabia, a close ally of the United  
3           States, launched an unprovoked attack against U.S. citizens on  
4           U.S. soil. That is or would be tantamount to an act of war.  
5           It is obviously an incredibly serious allegation and the FSIA  
6           rightly requires the plaintiffs to back it up before they're  
7           allowed to pursue discovery into their claims and seek  
8           discovery from a foreign sovereign. Foreign sovereigns are  
9           presumed immune from suit under the FSIA, and plaintiffs can  
10          only overcome that immunity by showing that they fall within  
11          one of the specified exemptions. Yet after 12 years and two  
12          trips to the Second Circuit, the plaintiffs still cannot do  
13          that. Indeed, they have not come close. The 9/11 attacks are  
14          among the most closely investigated events of United States  
15          history. There are congressional committees and independent  
16          commissions, the FBI, the intelligence agencies and the news  
17          media all spent exhaustive efforts investigating this. The  
18          United States Government, of course, does not believe that the  
19          Kingdom of Saudi Arabia launched these attacks, nor does the  
20          FBI, nor do any of the congressional committees or the  
21          independent commissions or any of the other government  
22          agencies.

23          Plaintiffs claim repeatedly that all they have to do  
24          is allege it and that they are entitled then to discovery on  
25          their claims. They say their allegations have to be accepted

1 as true, but that is absolutely incorrect under the governing  
2 FSIA law of this circuit. I'll just quote briefly from the  
3 Second Circuit's decision in 2013 affirming the dismissals of  
4 the Saudi Joint Relief Commission and the Saudi Red Crescent.  
5 The court said there, and this is 714 F.2d at 114, "Once a  
6 defendant presents a *prima facie* case that it is a foreign  
7 sovereign or instrumentality of a foreign sovereign," there is  
8 no question here that we have established that case, "the  
9 plaintiff has the burden of going forward with evidence showing  
10 that under exceptions to the FSIA immunity should not be  
11 granted."

12 Evidence, they have to present evidence. Conclusory  
13 allegations, speculation, innuendo and supposition, even if  
14 contained in piles and piles of documents, is not enough.  
15 Plaintiffs have the burden of coming forward with admissible  
16 concrete evidence, competent evidence showing that they fit  
17 within one of the exceptions, and they've utterly failed to do  
18 that. None of the material that they've submitted enables them  
19 to meet the substantive standards of the FSIA. They're out  
20 under three different theories:

21 First, under the entire tort rule, which the Second  
22 Circuit affirmed and is controlling in a decision affirming the  
23 dismissal of the Red Crescent and the Saudi Joint Relief  
24 Commission; second, they're out under the discretionary  
25 function exception, as Judge Casey found in 2005, a ruling



1 that's never been questioned in the Court of Appeals; and,  
2 third, express textual causation requirement in the FSIA  
3 because they do not come remotely close to showing that Saudi  
4 Arabia caused the 9/11 attacks, as Judge Robertson found in the  
5 very initial decision in this case in Burnett in 2003.

6 I'd like to walk through each of those three grounds  
7 for dismissal. The entire tort rule is the law of this circuit  
8 after the Saudi Red Crescent and the Saudi Joint Relief  
9 Commission decisions. It requires a tortious act by an  
10 official or employee of the government in the United States  
11 acting within the scope of his employment. Plaintiffs have  
12 zero evidence or even competent allegations of any tortious act  
13 by any Saudi official or agent acting within the scope of his  
14 employment. They give us four names: Omar al-Bayoumi, Fahad  
15 al-Thumairy, Osama Basnan and Abdul Rahman Hussayen.

16 I will say at the outset each of those names was  
17 investigated in detail by the 9/11 Commission, by the recent  
18 review commission, by the FBI, and none of them found any  
19 competent evidence to indicate that they were agents of Saudi  
20 Arabia, that they acted to assist the hijackers, knowing their  
21 plans to hijack the planes and crash them into the twin towers.

22 Let's start with Bayoumi. First of all, there's no  
23 evidence that he was even an intelligence agent. At the time  
24 he was here, he was officially seconded to Dallah Avco, a  
25 private company. His job in Saudi Arabia was to work for the

1 civil aviation division of the kingdom. He was seconded to  
2 Dallah Avco as part of a contract. His salary was paid by  
3 Dallah Avco, although they were reimbursed for that pursuant to  
4 the contract with Dallah Avco.

5 Now, plaintiffs spent a lot of time arguing that he  
6 was really an employee of the kingdom even though he was  
7 officially working for Dallah Avco. That's completely  
8 irrelevant. I'm not sure it's correct or not under Saudi law,  
9 but it's irrelevant because they can't suggest that he did  
10 anything within the scope of his employment, even as a civil  
11 aviation employee, that aided the hijackers or that assisted in  
12 the 9/11 attacks. The 9/11 Commission and the FBI both found  
13 that there was no evidence -- no evidence, those are the exact  
14 words they used -- that he was a Saudi agent, intelligence  
15 agent, that he materially assisted the hijackers or that he had  
16 any knowledge of the attacks.

17 The 9/11 review commission, just in March of this  
18 year, looked over everything again and concluded that nothing  
19 had changed in that respect.

20 THE COURT: Bayoumi was an employee at the time of the  
21 alleged acts at issue.

22 MR. KELLOGG: He was technically an employee of Dallah  
23 Avco, which was a private company, but he was employed pursuant  
24 to a contract with the civil aviation.

25 THE COURT: But I thought he was also a government

1 employee.

2 MR. KELLOGG: That's what they argue, that because he  
3 was seconded, because his salary was reimbursed, that he was  
4 still an employee of civil aviation.

5 THE COURT: I'm asking you. Was he an employee of  
6 civil aviation?

7 MR. KELLOGG: No, he was technically an employee of  
8 Dallah Avco at that time, your Honor.

9 THE COURT: How do you define the distinction if he  
10 was paid by civil aviation?

11 MR. KELLOGG: Because his salary was paid by Dallah  
12 Avco.

13 THE COURT: I thought ultimately that salary was  
14 reimbursed.

15 MR. KELLOGG: The salary was reimbursed.

16 THE COURT: So he was ultimately being paid by civil  
17 aviation.

18 MR. KELLOGG: He was ultimately being paid by Saudi  
19 Arabia, but he was being paid to work in civil aviation. They  
20 have not suggested that any of his alleged actions were within  
21 the scope of that employment, which is a separate issue.

22 THE COURT: Those are two different issues. I  
23 understand both those arguments, but I'm trying to figure out  
24 whether or not there's a genuine argument to be made that he's  
25 not an employee of the Saudi Arabian government.

1 MR. KELLOGG: There's an argument to be made that  
2 because his salary was ultimately paid by the Saudi government  
3 that you could consider him an employee of civil aviation, but  
4 that does not make him a Saudi intelligence agent. It does not  
5 mean that the scope of his employment, if you attribute that  
6 employment to civil aviation, had anything to do with assisting  
7 the hijackers or knowing of their activities.

8 THE COURT: How do I determine that?

9 MR. KELLOGG: I'm sorry?

10 THE COURT: How do I determine that? How do I  
11 determine whether or not that wasn't within the scope of his  
12 employment, that that wasn't what he was employed to do?

13 MR. KELLOGG: I'm sorry, your Honor. I didn't catch  
14 the question.

15 THE COURT: That that wasn't part of what he was  
16 employed to do.

17 MR. KELLOGG: His contract was to assist Dallah Avco  
18 in projects for the civil aviation division. There is no  
19 suggestion, and the FBI found and the 9/11 Commission found,  
20 that there was no evidence that he was either an intelligence  
21 agent, that he materially assisted the hijackers or that he  
22 knew what the hijackers were up to.

23 THE COURT: And his contract was with what entity?

24 MR. KELLOGG: I'm sorry. His contract? The  
25 plaintiffs have a copy of this contract. They have full

1 discovery from Dallah Avco. They have all his employment  
2 records through Dallah Avco. They haven't come up with  
3 anything to suggest that.

4 THE COURT: Is that a Dallah Avco contract, or is that  
5 a civil aviation contract, or is that a Saudi Arabian  
6 government contract? What's the nature of the contract? Who  
7 is the contract technically with?

8 MR. KELLOGG: They have these employment records from  
9 Dallah Avco, which include the contract between Dallah Avco and  
10 civil aviation.

11 THE COURT: Right.

12 MR. KELLOGG: Pursuant to which he was working for  
13 Dallah Avco at that time.

14 THE COURT: But when you say his contract, his  
15 contract was with whom?

16 MR. KELLOGG: His contract at the time of the 9/11  
17 attacks, actually, he was out of the United States by then, but  
18 his contract, his employment contract, was with Dallah Avco.

19 THE COURT: And is the Saudi Arabian government or  
20 civil aviation a party to that contract?

21 MR. KELLOGG: There's no question he was only working  
22 for Dallah Avco because civil aviation asked Dallah Avco to  
23 employ him as part of Dallah Avco's contract with civil  
24 aviation.

25 THE COURT: Again, I'm trying to figure out where

1 you're drawing the distinction that he is not either a civil  
2 aviation employee pursuant to a civil aviation contract and/or  
3 a Saudi government contract. As they say, I have four parties.  
4 I have Bayoumi, I have civil aviation, I have the Saudi Arabian  
5 government, and I forget now the company that you say he was  
6 working for. Why do you say he's only an employee of that one  
7 company, to the exclusion of the other two?

8 MR. KELLOGG: Your Honor, I don't think there's any  
9 dispute about the underlying facts. All the employment  
10 contracts have been provided. He was a long-term employee of  
11 civil aviation. He was seconded to Dallah Avco pursuant to a  
12 contract between civil aviation and Dallah Avco. His salary  
13 was paid by Dallah Avco, but it was reimbursed by civil  
14 aviation. Whether that makes him an employee at the time  
15 technically of Dallah Avco, which I believe it does, or civil  
16 aviation I don't think actually matters for purposes of this  
17 argument because the plaintiffs would have to show that he was  
18 doing something pursuant to and within the scope of his  
19 employment to aid the hijackers, knowing about their planned  
20 attack.

21 THE COURT: Before you go to them, my last question  
22 will be how you would characterize the difference in his  
23 relationship with civil aviation and the Saudi government  
24 before, during and after this contract.

25 MR. KELLOGG: Before he was definitely an employee of

1 civil aviation.

2 THE COURT: Right.

3 MR. KELLOGG: Which is an agency of the Saudi  
4 government.

5 THE COURT: Did that status ever change?

6 MR. KELLOGG: It did in the sense that there was a  
7 period in which he was seconded to Dallah Avco and hence  
8 technically became an employee of Dallah Avco during that  
9 period.

10 THE COURT: Is it your argument he's no longer an  
11 employee of civil aviation at that period?

12 MR. KELLOGG: It was clear he was going to go back to  
13 the civil aviation at the end of the secondment.

14 THE COURT: That's my question. What was his  
15 relationship? Was he an employee of the Saudi Arabian  
16 government at that period of time? You argue that he was an  
17 employee of the Saudi Arabian government and civil aviation  
18 prior to this contract, and I assume you take the position that  
19 he was an employee of civil aviation of the Saudi Arabian  
20 government after this contract.

21 MR. KELLOGG: Yes.

22 THE COURT: I'm trying to understand what you say his  
23 status was *vis-a-vis* civil aviation and the Saudi Arabian  
24 government during the period of this contract. Are you saying  
25 that he was an employee before and an employee after but was

1 not an employee during the period of this contract?

2 MR. KELLOGG: I would say during the period of the  
3 contract, he was technically an employee of Dallah Avco.

4 THE COURT: I know, but that doesn't answer my  
5 question. He could be an employee of Dallah Avco and an  
6 employee of the Saudi Arabian government at the same time.

7 MR. KELLOGG: No, I don't think he was an employee of  
8 the Saudi Arabian government at the same time, your Honor.

9 THE COURT: And you say he was an employee before this  
10 contract and an employee after this contract?

11 MR. KELLOGG: Correct.

12 THE COURT: And your argument that he wasn't an  
13 employee is not because there's anything that says he's no  
14 longer an employee, it's because they contracted to have him do  
15 work for the other entity.

16 MR. KELLOGG: Correct.

17 THE COURT: And that work was different work than he  
18 had been doing previously and afterwards for the Saudi Arabian  
19 government and civil aviation.

20 MR. KELLOGG: Yes, he was actually pursuing education,  
21 pursuing a higher degree in the United States.

22 THE COURT: All right.

23 MR. KELLOGG: But, as I say, my principal argument is  
24 that whether you characterize it one way or another doesn't  
25 actually matter because they can't show that he was an



1 intelligence agent, which they'd have to do, because clearly  
2 sponsoring the 9/11 attacks would not be within the scope of  
3 his duties with Dallah Avco or civil aviation.

4 THE COURT: But it's difficult for me to understand  
5 any job that that would be within the scope of his duties.

6 MR. KELLOGG: That's absolutely correct, unless you  
7 were an intelligence agent specifically charged to do that.

8 THE COURT: He could be a civil aviation agent  
9 specifically charged to do that. I don't think an intelligence  
10 agent necessarily means that within the scope of their  
11 employment, blowing up the World Trade Center is part of the  
12 job.

13 MR. KELLOGG: There is no evidence whatsoever, as  
14 multiple commissions and the FBI found, that he materially  
15 assisted the hijackers or that he knew what they were up to,  
16 and I think those are the dispositive facts here. The only  
17 evidence that plaintiffs present to the contrary is an exhibit  
18 that describes the possibility that Bayoumi could be a Saudi  
19 agent is no more than speculation. Now, they asked Senator  
20 Graham to say, Well, I was part of these commissions, I looked  
21 at this, and I think he might have been an agent, but he has no  
22 personal knowledge. His affidavit is not admissible in that  
23 regard, and his own book notes, and I quote from the book, "The  
24 FBI's concluded that al-Bayoumi was not a Saudi intelligence  
25 officer." And even Senator Graham concedes, and I will quote,

1 "There is no evidence that Bayoumi knew what was going on."

2 There was no material assistance given to the  
3 hijackers. The FBI found that, the independent commission  
4 found that, the review. And there's no claim that he knew what  
5 was going on, no valid evidence to that effect. The FBI  
6 interviewed him. They let him go, and they concluded that he  
7 was not involved in the 9/11 attacks.

8 The same thing is true of Thumairy, who was an  
9 employee of the embassy in the United States. There is no  
10 evidence or even allegation that Thumairy did anything  
11 whatsoever to help the hijackers. Again, the 9/11 report, at  
12 217, claims no evidence to support such claim.

13 THE COURT: My focus is really on not whether there's  
14 no evidence but whether the accusations that are made in the  
15 complaint about their activity, whether there is a factual  
16 basis for those allegations. Bayoumi is accused of meeting  
17 with the hijackers and is accused of offering to assist the  
18 hijackers to settle in the United States and find them an  
19 apartment and provide them financial support. I mean, there  
20 are specific allegations, which I assume you would agree if  
21 there was a factual basis for those allegations, those would be  
22 sufficient allegations.

23 MR. KELLOGG: I would distinguish that, your Honor,  
24 because even if you look at the allegations, we said he met  
25 them at a restaurant, that he introduced them around. He

1 helped them find an apartment, that when they couldn't write a  
2 check, he wrote a check for them and was immediately  
3 reimbursed. None of that adds up to any indication that he was  
4 assisting them in order to do the 9/11 attacks or that he knew  
5 what was going on. Their own star witness, even though he has  
6 no personal knowledge, Senator Graham, admits that there's no  
7 indication that Bayoumi knew what was going on. There would  
8 have to be knowledge, and not only is there no competent,  
9 nonspeculative, nonconclusory allegation that he had knowledge,  
10 there's absolutely no evidence in the huge pile of materials  
11 that they've presented that suggests that.

12 THE COURT: OK.

13 MR. KELLOGG: And Bayoumi has been so thoroughly  
14 investigated by the FBI and the various congressional reports  
15 and the department of justice and they have all concluded that  
16 there is no evidence. Now, I don't cite those materials as  
17 conclusive, as an exoneration. I cite them for two reasons:  
18 one, to make the Court skeptical of mere allegations and  
19 conclusory allegations to the contrary put in by plaintiffs;  
20 and second, to hold them to their obligation under the FSIA to  
21 come forward with concrete admissible evidence that indicates  
22 that an FSIA exception applies, and that would mean that  
23 Bayoumi was knowingly acting to assist the hijackers in  
24 completing the 9/11 attacks, and there is absolutely nothing in  
25 the record to suggest that and, therefore, no basis for going

1 on and allowing these allegations to continue.

2 I'm not sure if the Court is mainly interested in  
3 Bayoumi. I'm happy to talk about Thumairy.

4 THE COURT: I'm just using that as an example. You  
5 were saying there's no evidence that he was involved at all.  
6 There are clearly allegations he was involved.

7 MR. KELLOGG: Correct, your Honor.

8 THE COURT: The question for me is not whether there  
9 is a lack of allegations, it's whether there is a basis for me  
10 to conclude that they've come forth with evidence and that  
11 evidence is sufficient to demonstrate the exception here that  
12 they say should apply to immunity, so I can't ignore their  
13 allegations. I have to examine whether or not, given what's  
14 been put before me, there's a reasonable basis, factual basis,  
15 to say that there's either direct evidence or circumstantial  
16 evidence that would support the claim that these individuals  
17 knew the hijackers, were directly involved with assisting the  
18 hijackers, and that direct evidence or logical conclusion,  
19 given the nature of the activity that they say they have  
20 evidence of, that the nature of that activity one could either  
21 directly conclude or infer that their actions were to support  
22 the hijackers in committing these acts.

23 MR. KELLOGG: Understood, your Honor. I would suggest  
24 that plaintiffs' allegations being conclusory and speculative  
25 wouldn't even pass muster under Twombly and Iqbal, but they

1 certainly don't pass muster under the higher standard of the  
2 FSIA, which says they have to come forward with actual  
3 competent admissible evidence.

4 I'll move on to the other three supposed agents.  
5 There was Thumairy, who was an employee of the Saudi embassy at  
6 the time, but there is absolutely no evidence or allegation,  
7 even, that he did anything whatsoever to help the hijackers.  
8 Plaintiffs only point to one conversation that he had with  
9 Bayoumi before Bayoumi met with the hijackers, but there's no  
10 allegation as to why that conversation took place or what was  
11 discussed or whether he gave any instructions to Bayoumi  
12 whatsoever. Even former Senator Bob Graham admits that what  
13 the two men talked about is completely unknown, and even if  
14 they could show that he provided any assistance, they can't  
15 show that it was within the scope of his employment and that he  
16 was acting at the behest of the Saudi government.

17 Then there's Mr. Basnan. Again, the 9/11 report, at  
18 516, note 24, says there's no evidence that he worked for the  
19 Saudi government or that he did anything whatsoever to help the  
20 hijackers. He was interviewed by the FBI and he was cleared.  
21 The only theory they have, which is unsupported by any  
22 competent evidence, is that money was channeled from Basnan to  
23 Bayoumi through checks written to assist Basnan's wife, who was  
24 suffering from thyroid cancer. But there's no evidence and not  
25 even an allegation that that money went from Bayoumi to the

1 hijackers.

2 As for Abdul Hussayen, who is deceased, there's no  
3 evidence that he was an official of the Kingdom of Saudi Arabia  
4 at the relevant time period. In fact, his declaration says  
5 exactly the opposite, that he was retired and working in  
6 various private charitable organizations. There's no  
7 allegation or evidence that he did anything to help the  
8 hijackers. He was interviewed and cleared by the FBI, and the  
9 big allegation that plaintiffs made in the Second Circuit,  
10 which is that he changed hotels in order to stay with the  
11 hijackers, which the Second Circuit said might be suspicious,  
12 there's no evidence of that either. All they cite is a  
13 newspaper article which indicates that he stayed at this hotel,  
14 but there's no evidence whatsoever about him switching hotels  
15 to stay with the hijackers.

16 In none of those four cases is there anything to  
17 suggest that these were agents of Saudi Arabia, directed by the  
18 government of Saudi Arabia, to provide material assistance to  
19 make the 9/11 attacks possible. That's the whole tort rule.  
20 They have to have committed a tort in the United States, and  
21 they cannot satisfy that allegation.

22 The discretionary function, this mainly applies to the  
23 allegations of support to charitable organizations which then  
24 in turn supposedly gave money to al-Qaeda. Judge Casey already  
25 dismissed on discretionary function grounds that deciding what

1 charitable organizations to support or not support is a  
2 governmental activity. That ruling has never been questioned  
3 by the Court of Appeals, so it's still a valid ruling. And  
4 their only other argument in this case is that, Well, there are  
5 various charities that did operate, like al-Haramain, in the  
6 United States, and those charities were alter egos of the  
7 kingdom, but there's absolutely no allegation or evidence that  
8 any of the day-to-day operations of any of these charities,  
9 which were not even governmental agencies, these are private  
10 charities. These are NGOs. If they'd been governmental  
11 charities, Muslim World League, IIRO, WAMY, al-Haramain, they  
12 would have been dismissed by now under the FSIA. They're not  
13 even governmental instrumentalities, and there's no allegation  
14 that the government of Saudi Arabia plays any role in the  
15 day-to-day operations, which is what's required under Supreme  
16 Court and Second Circuit precedent in order to pierce the veil  
17 and hold that they're an alter ego of the kingdom. So the two  
18 big prongs that they have, the agents and the charities, both  
19 fail on the record before this Court.

20 Finally, there is the causation issue. The standard  
21 of causation under the FSIA, which requires that the injuries  
22 and deaths be caused by the tortious act of that foreign state,  
23 it has to be some sort of fairly direct but-for causation, as  
24 Judge Robertson held initially in this case in the Burnett  
25 ruling in 2003.

1           The question before this Court is whether there's any  
2 evidence to suggest that but for the kingdom or the Saudi High  
3 Commission's actions the twin towers would still be standing  
4 today, that these attacks would not have taken place, and the  
5 answer is clearly no. Plaintiffs have no evidence of any  
6 misconduct whatsoever, and looking at the causation issue makes  
7 it clear just how irrelevant the bulk of materials that the  
8 plaintiffs have presented to this Court are. There are dozens  
9 of paragraphs about what happened in Afghanistan in the 1990s.  
10 They have dozens of paragraphs criticizing the kingdom's  
11 religious officials and religious beliefs. They have dozens of  
12 paragraphs about things that happened in the Philippines or in  
13 Bosnia. They have testimony of Moussaoui.

14           The Court may recall that they received three  
15 extensions of time to file their briefs in this case because  
16 they wanted to get the testimony of Moussaoui before this Court  
17 which was going to blow the case wide open. They put the  
18 testimony and there's absolutely nothing in there that links  
19 Saudi Arabia to the 9/11 attacks, any sort of causation between  
20 the two. It's all about things that were happening in  
21 Afghanistan. It's all about donations to al-Qaeda. Actually,  
22 it wasn't even called al-Qaeda then in the 1990s, and it's  
23 about a rather bizarre plot to blow up Air Force One that they  
24 draw no connection with to the 9/11 attacks, not the slightest  
25 attempt to tie any of this vast, colorful filler to the 9/11



1 attacks.

2 Finally, your Honor, and I'll be brief on this, I just  
3 wanted to talk about jurisdictional discovery and why the Court  
4 should not order jurisdictional discovery. First of all, I'm  
5 going to give four reasons:

6 First, the plaintiffs have not satisfied the FSIA  
7 threshold for obtaining discovery from a foreign sovereign,  
8 which is to present enough evidence to create a factual issue  
9 that one or more exceptions to the FSIA applies. There's a  
10 huge danger in subjecting a foreign sovereign to discovery in  
11 U.S. courts based on conclusory allegations, and the Second  
12 Circuit in this case, in Virtual Countries, Judge Robertson has  
13 made it very clear that the plaintiffs' allegations are  
14 insufficient. They have to have concrete evidence that one of  
15 the exceptions applies.

16 Second, jurisdictional discovery, if it takes place,  
17 has to be limited, and I'll quote here from the EM Limited  
18 case, a Second Circuit decision, it has to be limited to  
19 "specific facts crucial to an immunity determination."  
20 Plaintiffs have waived any effort to seek such discovery by  
21 failing to identify any such material facts, either back in  
22 2005 or now. Even today, all they have is a footnote, a  
23 footnote which is incapable of preserving an issue, saying if  
24 the Court decides that any issues are important, we would like  
25 discovery. In other words, they're going for all or nothing.

1 They don't want jurisdictional discovery, they want complete  
2 merits discovery. In the 587 paragraphs of their allegations,  
3 they have not focused their attack on any specific issues of  
4 material fact that they've been able to call into question.  
5 Essentially, their approach is an admission that they have no  
6 such evidence sufficient to get out of the gateway threshold  
7 for FSIA discovery.

8 The third point I'd like to make is discovery would be  
9 futile in this case because the case has already been  
10 thoroughly investigated. The four alleged agents that they  
11 discussed, Bayoumi, Basnan, Thumairy and al-Hussayen, were all  
12 interviewed by the FBI. We all know what they would say.  
13 Plaintiffs have had the benefit, too, of discovery of the  
14 nongovernmental charities, and it's still clear that they  
15 haven't come close to anything that would prove their alter ego  
16 theory or their agency theory.

17 The fourth reason is all that's left to the plaintiffs  
18 at this point is a general fishing expedition of the Saudi  
19 government files and in particular its intelligence files  
20 because they will want us to try to prove a negative, that none  
21 of these people are agents, intelligence agents, of Saudi  
22 Arabia. Now, nothing of the kind has ever been permitted in a  
23 U.S. court, nothing that would open up such files and enable  
24 broad-ranging discovery of a foreign sovereign. It would  
25 trench on the comity that's afforded to foreign sovereigns as

1 another judge in this district in the Freund case indicated in  
2 refusing to open up sealed records of the French government  
3 concerning the Holocaust and World War II. The United States  
4 obviously would never permit such discovery of its own files.  
5 Suppose, for example, that in Russia people were to claim that  
6 attacks by Chechnyan separatists in Russia were somehow caused  
7 or sponsored or aided and abetted by the United States and  
8 therefore they should have access to CIA files to find out  
9 whether certain people were or were not agents, certain people  
10 did or did not aid and abet those attacks. The United States  
11 would never allow that, your Honor, and we should not be in a  
12 position as a matter of comity of saying that a foreign  
13 government should open up its files to the plaintiffs in this  
14 case, not, certainly not, when their allegations are conclusory  
15 and when they have failed after 12 years to overcome the  
16 findings of independent commissions, the FBI, etc., that Saudi  
17 Arabia was not responsible for these attacks.

18 THE COURT: Thank you.

19 MR. CARTER: Good morning, your Honor. Sean Carter,  
20 on behalf of the plaintiffs.

21 I'd like to just begin by clarifying what this case is  
22 actually about, your Honor. The case is about whether or not  
23 operational-level agents of the Saudi government in the United  
24 States provided direct aid and assistance to the September 11th  
25 hijackers, in particular two of them named Nawaz al-Hazmi and

1 Khalid al-Midhar, in furtherance of the September 11 plot, and  
2 whether or not charity alter egos of the government provided  
3 the overwhelming resources that enabled al-Qaeda to acquire the  
4 global strike capabilities it employed to deadly effect on  
5 September 11. And on both of those points, your Honor, the  
6 record presently before this Court contains extensive,  
7 thorough, detailed, well documented, well supported and  
8 compelling support in form of both facts and evidence in  
9 support of both of those propositions. The kingdom's effort to  
10 obtain dismissal at this point amounts to no more than a plea  
11 that the Court simply ignore wholesale all of the facts and  
12 evidence of record. It rests on a rather remarkable suggestion  
13 that plaintiffs, in a pre-discovery jurisdictional context, are  
14 required to come forward and prove their claims conclusively  
15 through direct and admissible evidence, without the benefit of  
16 discovery and in an environment where the foreign state  
17 defendant has not even bothered to come forward with competent  
18 evidence to challenge a single one of the factual allegations,  
19 and that simply is not how it works, your Honor.

20 There are a myriad of problems with the procedural  
21 construct they've intended to invent here, the most fatal of  
22 which is that the Second Circuit Court of Appeals has already  
23 considered it in the context of both the appeals it decided in  
24 2008 and 2013, rejected their formulation of the burdens and  
25 standard of review, and specifically held that plaintiffs are

1 entitled to have their factual allegations accepted as true and  
2 to have all inferences drawn in their favor in deciding motions  
3 to dismiss in this case by the Saudi government and its  
4 instrumentalities.

5 Now, the issue was first presented to the Second  
6 Circuit, your Honor, in the context of appeals decided in 2008,  
7 which as your Honor will recall concerned the Saudi High  
8 Commission and kingdom specifically. In the context of that  
9 appeal, plaintiffs identified four issues for which they sought  
10 resolution from the Second Circuit, one of which was whether or  
11 not plaintiffs were required to come forward with  
12 particularized proofs or evidence in support of their  
13 allegations at the motion-to-dismiss phase, as the kingdom and  
14 as HSC had argued, or instead entitled to have the allegations  
15 in their complaint accepted as true.

16 In issuing its decision, the Second Circuit very  
17 clearly resolved the issue in plaintiffs' favor citing its own  
18 decision in Garb v. Poland and holding specifically that "the  
19 complaints, which we accept as true at the pleading stage,  
20 allege the facts set forth below." It then proceeded to credit  
21 the factual allegations of plaintiffs' pleadings, including  
22 those concerning the activities of the government's charity  
23 alter egos. It acknowledged and credited the allegations that  
24 the acts of those charities were attributable to the  
25 government, and it complemented the allegations concerning

1 their involvement in supporting al-Qaeda by saying that they  
2 included a wealth of detail conscientiously cited to published  
3 and unpublished sources.

4 The Second Circuit again rejected the formulation that  
5 the kingdom is attempting to relitigate today in its 2013  
6 decision concerning the Saudi Joint Relief Committee and the  
7 Saudi Red Crescent in which it indicated in its statement of  
8 the standard of review that its "review of the district court  
9 decision proceeded by accepting all material facts alleged in  
10 the complaint as true and drawing all reasonable inferences in  
11 the plaintiffs' favor."

12 Now, your Honor, there is a host of other problems  
13 with the kingdom's articulation of the burden and standard of  
14 review.

15 THE COURT: Remind me. I don't remember it being in  
16 the specific context of sovereign immunity.

17 MR. CARTER: Your Honor, both of those decisions, the  
18 Saudi Joint Relief Committee and the Saudi Red Crescent  
19 decision, were foreign sovereign immunity decisions. The 2008  
20 decision relating to the kingdom and Saudi High Commission was  
21 a motion to dismiss under the Foreign Sovereign Immunities Act.  
22 In fact, your Honor, the motion to dismiss that was decided by  
23 the Second Circuit in 2008 went up to the Second Circuit on a  
24 procedural posture that is identical to the one that is  
25 presently before this Court. As is the case now, the kingdom

1 did not present any affirmative affidavits of its own to  
2 challenge any of plaintiffs' material factual allegations. All  
3 it did was urge that plaintiffs' allegations were in some way  
4 incompatible with the findings of the 9/11 Commission, which it  
5 claimed had fully exonerated Saudi Arabia and directly refuted  
6 plaintiffs' allegations. This issue has already been clearly  
7 resolved.

8           The other problem, your Honor, is that the kingdom  
9 simply fails to understand the nature of the burden-shifting  
10 regime under the FSIA. Any obligation to come forward with  
11 facts or evidence in support of the allegations, the well-pled  
12 allegations of the plaintiff's pleading, can potentially arise  
13 only after the foreign state defendant makes a competent  
14 challenge to a fact that is material to the resolution of the  
15 immunity issue, and now the courts have addressed how a foreign  
16 state must do that, and in particular the D.C. Circuit  
17 addressed this in its Kilburn decision and it said quite  
18 clearly "a foreign state defendant does not carry that burden  
19 simply by pointing to alleged inconsistencies between the  
20 plaintiffs' pleadings and the content of government reports,"  
21 which is at best what the Saudi government is trying to do  
22 here. Instead, the defendant has to come forward with a  
23 specific affidavit making a concrete and particularized  
24 challenge to an allegation that is essential to the  
25 jurisdictional theory, and they simply haven't done that.

1           Your Honor, what we're left with is that this motion  
2 proceeds as other jurisdictional contests based on the factual  
3 allegations and other material of record and involves a  
4 straightforward application of the text of the Foreign  
5 Sovereign Immunities Act to those facts, and on that basis,  
6 there can be no question that plaintiffs have carried their  
7 burden at this stage of the litigation to present factual  
8 allegations demonstrating jurisdiction under the Foreign  
9 Sovereign Immunities Act tort exception, and I think in that  
10 regard, your Honor, a summary of the particular allegations and  
11 evidence of record relating to the activities of Saudi  
12 government officials, Omar al-Bayoumi and Fahad al-Thumairy,  
13 and the support that they provided to Nawaz al-Hazmi and Khalid  
14 al-Midhar is helpful to the Court's analysis, so I'll turn to  
15 that for a moment.

16           Al-Hazmi and al-Midhar were personally selected for  
17 the September 11 plot by Usama Bin Laden. Both had fought  
18 under al-Qaeda auspices in three countries, including Bosnia  
19 and Chechnya. Bin Laden thought that their battle experience  
20 would serve useful in the heat of the September 11 plot, but  
21 both Bin Laden and Khalid Shaikh Mohammed had serious  
22 reservations about their ability to carry out the mission  
23 assigned to them, most especially because neither spoke any  
24 English and neither had spent any time in the West, and so the  
25 likelihood that they could assimilate into the West and begin



1 to carry out their plot without detection by law enforcement  
2 presented a huge risk to the al-Qaeda plot.

3 They arrived in the United States in Los Angeles on  
4 January 13, 2000, and as the 9/11 Commission concluded in its  
5 report, they were ill-prepared for a mission in the United  
6 States. Their only qualifications for this plot were devotion  
7 to Usama Bin Laden, their veteran service and their ability to  
8 get valid U.S. visas. Neither had spent any time in the West  
9 and neither spoke much, if any, English. For all of those  
10 reasons, the 9/11 Commission expressly concluded that it was  
11 unlikely that Hazmi and Midhar would have come to the United  
12 States without arranging to receive assistance from one or more  
13 individuals informed in advance of their arrival.

14 Now, during the critical first two-week period they're  
15 in the United States, the 9/11 Commission confirms that they  
16 spend time at the King Fahad Mosque in Los Angeles. The imam  
17 at that mosque at that time is Fahad al-Thumairy, the Saudi  
18 government cleric working under the auspices of the Ministry of  
19 Islamic affairs office in the Los Angeles consulate. For his  
20 part, the 9/11 Commission confirms that Thumairy is an Islamic  
21 extremist and strict adherent to wahabbi ideology. They  
22 further indicated that Thumairy associated with a particularly  
23 radical faction within the local community, which included  
24 people supportive of the events of September 11, 2001, and even  
25 more to the point, that Thumairy maintained extensive ties to

1 terrorists which ultimately caused the State Department to ban  
2 him from the United States in 2003.

3 Now, on this point, the 9/11 Commission specifically  
4 acknowledges that the circumstantial evidence makes Thumairy a  
5 logical person to consider as a possible point of contact for  
6 Hazmi and Midhar at the time of their arrival in the United  
7 States. Thumairy then proceeds on February 1, 2000, just two  
8 weeks after the hijackers' arrival, to meet for an hour at the  
9 Saudi consulate with Omar al-Bayoumi, who is beyond dispute an  
10 agent of the Saudi government. Your Honor had an extensive  
11 exchange with Mr. Kellogg about this issue, and I'll turn to it  
12 in more detail in a moment, but there is at this point  
13 absolutely no dispute that Bayoumi is an agent of the Saudi  
14 government.

15 As Mr. Kellogg mentioned, we've been engaged in  
16 discovery with Dallah Avco, the government contractor that  
17 nominally employed Bayoumi. For its part, Dallah Avco has  
18 affirmatively told us in discovery that he was an employee at  
19 all time of the Saudi government and they merely served as a  
20 paymaster for him. They have indicated that they have no  
21 records pertaining to any work he performed because he wasn't  
22 performing any work for them. The full range of facts  
23 documented not only in the amended pleading but in the FBI  
24 reports revealed that Bayoumi didn't perform any work for  
25 Dallah Avco or anyone else to that effect, and that everyone

1 who had occasion to observe him felt he was an agent of the  
2 Saudi government of some type, that his role involved watching  
3 dissident Saudis in the United States and reporting on their  
4 activities to the Saudi embassy. His range of contacts  
5 document systematic contacts with the Saudi embassy and in  
6 particular the Islamic Affairs departments of the embassy in  
7 Washington and the consulate in Los Angeles, consistent with  
8 the views of the people who observed him that he was an agent  
9 working under the auspices working under the Ministry of  
10 Islamic Affairs and reporting to the Ministry of Islamic  
11 Affairs on his activities.

12           Following the meeting with Thumairy that morning,  
13 Bayoumi proceeds immediately to a restaurant in the Los Angeles  
14 area where he promptly meets the two hijackers who have just  
15 arrived in the United States, Hazmi and Midhar.

16           THE COURT: Before you go beyond that, what are you  
17 specifically alleging that Thumairy did to assist the  
18 hijackers?

19           MR. CARTER: Your Honor, the allegation is very clear  
20 that Thumairy was the point of contact in the United States for  
21 the hijackers who needed a support network here and that he  
22 employed Bayoumi who was effectively reporting to his office in  
23 the Los Angeles consulate to help the two hijackers assimilate  
24 into the United States, to help them find lodging, to help them  
25 enroll in flight courses.

1 THE COURT: That's a general conclusory statement.  
2 What specific role do you say Thumairy played? What he did do?  
3 I mean, give me an example of something he did that would  
4 support that conclusion.

5 MR. CARTER: Your Honor, the circumstances that follow  
6 demonstrate, and the affidavits from the principal  
7 investigators, Senator Graham and Secretary Lehman, bear this  
8 out, they specifically affirm that Bayoumi was acting at the  
9 direction of the Saudi government.

10 THE COURT: I'm talking about Thumairy first. You  
11 said Thumairy was at the mosque and that he met with Bayoumi,  
12 but you don't tell me what you say he did to further the  
13 attack. What specific assistance are you alleging that he  
14 provided to the 9/11 attack?

15 MR. CARTER: Yes, your Honor. His specific assistance  
16 is to deploy Bayoumi to give them lodging, to help them find an  
17 apartment.

18 THE COURT: When you say deploy Bayoumi, again, those  
19 are conclusory statements. You are saying he did specifically  
20 what that assisted the hijackers, in what way?

21 MR. CARTER: Your Honor, we're saying that he was  
22 effectively in charge of Bayoumi as the representative of the  
23 Ministry of Islamic Affairs consulate and that in that capacity  
24 he had the authority to direct Bayoumi to engage in these  
25 activities.

1 THE COURT: You're accusing him of directing Bayoumi  
2 to do what?

3 MR. CARTER: To help the hijackers assimilate in the  
4 United States, to help them relocate to San Diego, which, as it  
5 happens, is the city where Khalid Shaikh wanted them to end up,  
6 even though they were arriving in Los Angeles, to ensure that  
7 they found lodging, to ensure that they were able to sign up  
8 for flight lessons.

9 THE COURT: All right, but that conclusion that these  
10 are the things that he directed Bayoumi to do, the factual  
11 basis on which you base that is the fact that he was at the  
12 mosque, that he met with Bayoumi. You don't have any evidence  
13 as to what conversations he might have had with Bayoumi or any  
14 contacts that he might have had with the hijackers.

15 MR. CARTER: Your Honor, as with any case involving a  
16 covert conspiracy involving criminal wrongdoing, the  
17 motivations of the actors have to be, and their state of mind  
18 has to be, inferred from the full spectrum of circumstantial  
19 evidence.

20 THE COURT: Sure.

21 MR. CARTER: Associated with their activities.

22 THE COURT: Yes, but, as I say, you would agree that  
23 it would be an unreasonable inference for me to draw that if  
24 you say based on what you know he went to Bayoumi and gave  
25 Bayoumi a bomb. I would say to you, That's interesting, but

1 what's the factual basis that you allege that when he met with  
2 Bayoumi he handed him a bomb. I'm asking it in that same  
3 context. What's the factual basis for you to allege that when  
4 he met with Bayoumi he said, Give lodging to the hijackers,  
5 assist them and give financial support to the hijackers so that  
6 they can carry out the 9/11 attacks? It suggests the inference  
7 that because of his role at the mosque and because he met with  
8 Bayoumi, one should conclude that these are the conversations  
9 that he must have had with Bayoumi?

10 MR. CARTER: Your Honor, it arises from the fact that  
11 the 9/11 Commission concluded he was the logical point of  
12 contact based on the circumstantial evidence upon their  
13 arrival.

14 THE COURT: I know, but the 9/11 report didn't have a  
15 factual conclusion that you're asking me to draw. They didn't  
16 specifically say that he met with Bayoumi and directed Bayoumi  
17 to provide assistance to the hijackers. You're not getting  
18 that from them. I'm trying to figure out whether or not  
19 there's any basis other than the things that I laid out in  
20 terms of his role at the mosque and relationship and meeting  
21 with Bayoumi. What's the factual basis that we can conclude  
22 that these are likely the conversations, directions, assistance  
23 that he was providing to the hijackers?

24 MR. CARTER: Yes, your Honor. We have affidavits from  
25 two principals of the investigations, Senator Bob Graham, who

1 has viewed all of the intelligence and offered that conclusion,  
2 as well as from Secretary Lehman, who has specifically said  
3 that none of this can possibly be explained away as  
4 coincidental, that when you look at the full range of facts and  
5 evidence developed by the 9/11 Commission, the conclusion  
6 follows that al-Hazmi and Midhar knew who to go to.

7 THE COURT: What are they basing that on factually?  
8 Because that's not the conclusion of the majority of the  
9 commission.

10 MR. CARTER: No, your Honor. With regard to the  
11 conclusion of the commission, your Honor, the historical  
12 accounts make clear that the staff investigators who handled  
13 this aspect of the investigation felt that they had documented  
14 a direct link between the Saudi government and the September 11  
15 plot based on the explosive material they had uncovered  
16 concerning the activities of Fahad al-Thumairy and Omar  
17 al-Bayoumi. They included affirmative allegations of that  
18 effect in a draft of their report, but they were removed at the  
19 11th hour by the senior staff. Now, the senior staff of the  
20 commission removed them because they determined that as a  
21 political matter the commission should not include an  
22 allegation, an affirmative allegation, of foreign government  
23 involvement in the September 11 attacks unless it could prove  
24 it with 100 percent certainty. Now, that is a far different  
25 standard than applies in a preliminary pleading posture in a

1 civil proceeding.

2 THE COURT: I'm trying to understand. What are you  
3 implying that they had factually that we don't have before us?

4 MR. CARTER: Your Honor, I think factually what they  
5 had is, first of all, the fact that the hijackers went to the  
6 mosque to visit the imam; second of all, that he has documented  
7 terrorist connections; third of all, that he has the meeting  
8 with Bayoumi in the morning and Bayoumi improbably travels to  
9 the exact location where the hijackers are and proceeds to then  
10 provide them with the exact forms of support the al-Qaeda  
11 leadership thought they so desperately needed in order to carry  
12 out their assignment; that Bayoumi then proceeds to also  
13 connect them with Anwar al-Aulaqi, another radical cleric who  
14 would rise to become a senior member of the al-Qaeda  
15 leadership, and that throughout this entire period, Bayoumi is  
16 receiving checks from Osama Basnan, another Saudi agent, who  
17 according to the FBI, is an ardent Usama Bin Laden supporter,  
18 and that collectively what all of this evidence shows places  
19 Fahad al-Thumairy and Omar al-Bayoumi at the very center of a  
20 network of radical extremists with documented terrorist ties  
21 who come immediately to the aid of the 9/11 hijackers upon  
22 their arrival in the United States; that they do that under  
23 circumstances where the 9/11 Commission says that those  
24 hijackers were ill-prepared for a mission in the United States  
25 and unlikely to have come here without arranging for a network



1 of assistance in advance and proceed to provide the exact forms  
2 of support that they need in order to carry out their mission.

3 THE COURT: Let me put it in the context of the three  
4 things that you have to demonstrate. Define for me what you  
5 say is the tort.

6 MR. CARTER: Your Honor, the tortious act is the  
7 assistance that they arranged and provided through Bayoumi to  
8 the hijackers to help them get settled in the United States.

9 THE COURT: Wouldn't Bayoumi have to have provided  
10 that assistance rather than asking someone else to provide that  
11 assistance to qualify as being someone who had provided a  
12 government official who was provided assistance and was himself  
13 involved in the tortious act?

14 MR. CARTER: Your Honor, the theories that are the  
15 predicate to the claims encompass secondary theories of  
16 liability, like conspiracy theory and aiding and abetting.  
17 Certainly if Thumairy agreed to participate by agreeing to help  
18 the hijackers find someone to help them relocate, he would have  
19 committed a tortious act.

20 THE COURT: Hasn't the court already said that  
21 secondary liability is not sufficient, that it can't be that  
22 they helped someone else commit the tortious act; they have to  
23 have committed the tortious act as a government employee in the  
24 United States?

25 MR. CARTER: Your Honor, that's not the holding of the

1 Second Circuit in this case, and I think its ruling with regard  
2 to Dallah Avco more than demonstrates that principle and also  
3 the sufficiency of everything that's alleged here as to the  
4 Saudi government. The Second Circuit reinstated the claims  
5 against Dallah Avco, which were predicated on the argument that  
6 they engaged in tortious conduct directed at the United States  
7 by providing a ghost job to Omar al-Bayoumi, which he then used  
8 to conceal his activity and thus enabled him to provide support  
9 to the September 11 hijackers, and the Second Circuit endorsed  
10 those as providing a sufficient nexus to the September 11  
11 attacks to go forward.

12 Now, Dallah Avco is further removed from the  
13 assistance to the hijacker than either Thumairy or Bayoumi, for  
14 certain. Their tortious act involves only providing a cover  
15 job to him. These individuals are alleged to have directly  
16 assisted them in helping the hijackers get settled.

17 THE COURT: Also, didn't the U.S. government, the  
18 justice department, in opposition to the request for certiorari  
19 in the United States Supreme Court, specifically take that  
20 opposite position?

21 MR. CARTER: No, your Honor. The position the  
22 government took in what amounted to a footnote is that there  
23 were allegations that there were agents in the United States  
24 assisting the hijackers, but perhaps they were insufficient  
25 under the Twombly/Iqbal pleading rule.

1           THE COURT: Didn't they specifically urge the court  
2 not to take it because there was no third-party agent, there's  
3 no third-party agent liability?

4           MR. CARTER: No, your Honor. They urged the court not  
5 to take it on the basis that although they acknowledged that  
6 the Second Circuit had committed error in the basis of its  
7 original ruling, they thought that there were other potential  
8 bases on the record that existed at that time to affirm the  
9 dismissals below. Now, part of that turned on their view of  
10 the sufficiency of the allegations relating to Bayoumi. The  
11 difference, your Honor, is, first of all, with respect to the  
12 department of justice, it was an amicus brief and they raised  
13 the issue in a footnote. It's unclear exactly what record they  
14 were looking at, but they certainly weren't looking at the  
15 record that's presently before the Court. They did not have  
16 the benefit of the affidavits of the 9/11 Commission members,  
17 who have affirmatively endorsed plaintiffs' theories on the  
18 basis of the evidence that they've seen.

19           They don't have the benefit of Senator Graham in his  
20 capacity as chair of the 9/11 Commission, which specifically  
21 endorsed plaintiffs' theories on the basis of the evidence and  
22 intelligence he has seen. They don't have the benefit of  
23 knowing that the historical account of the 9/11 Commission  
24 confirms that the individual staff members who conducted this  
25 investigation felt that they had documented a strong and direct

1 connection between the Saudi government and the September 11  
2 plot, all of which adds additional support and certainly is  
3 sufficient to sustain the plausibility of the allegations.

4 THE COURT: I'm not sure that it's sufficient for me  
5 to simply rely on their opinions. I have to rely on the facts  
6 which would support such a thing. Senator Graham can't just  
7 say I reviewed all the evidence and I think that they were  
8 involved. I have to know what it is logically that would make  
9 him, you or I lead to that conclusion.

10 MR. CARTER: Your Honor, there is ample support for  
11 that in the averment, which identifies all of the range of  
12 interactions between these principals, the Saudi government  
13 agents in southern California and the hijackers, as well as all  
14 of the FBI reports, the original FBI reports which documented  
15 these connections as well and provide the specific factual  
16 detail showing the sequence of the meetings, the timings of the  
17 interactions, the details concerning the terrorist activities  
18 of the Saudi government agents and their connections. All of  
19 that material is in the record, and it is that kind of evidence  
20 that those principals of the investigations were relying upon.

21 Now, their views of the evidence, your Honor, you may  
22 not have to accept them as gospel at this stage.

23 THE COURT: I need to know on what basis they have  
24 that view because if somebody else left the room and said I  
25 have the opposite view, I can't give that any evidentiary

1 weight.

2 MR. CARTER: Again, your Honor, and that's the issue,  
3 we're not required to come forward with affirmative and  
4 admissible evidence at this stage.

5 THE COURT: That's not evidence at all. It's not even  
6 inadmissible evidence, simply because someone in this room  
7 thinks that. I have to know why they think that, not just  
8 because they say, Well, I saw some stuff that you haven't seen  
9 and it's my opinion that this is what happened, particularly  
10 when it's not the view taken by the commission.

11 MR. CARTER: Your Honor, again, this idea that the  
12 9/11 Commission didn't endorse this and that they refuted this  
13 is incorrect. They actually go out of their way to make clear  
14 that they weren't making any pronouncement on this issue. They  
15 specifically say we can't say affirmatively whether or not the  
16 meeting between Bayoumi and the hijackers happened by  
17 coincidence or by design. Again, they also acknowledge that  
18 the circumstantial evidence supports the conclusion that  
19 Thumairy was the logical point of contact, but based on the  
20 standard that they assigned to themselves requiring 100 percent  
21 certainty on the basis of direct evidence, they declined to  
22 make any affirmative findings on these points.

23 THE COURT: The findings aren't what's critical. It's  
24 what evidence leads to those conclusions. As I say, it's not  
25 as compelling even if the commission said it's our opinion that

1 they were involved. I would still have to say what do you base  
2 that opinion on. Is it on some evidence that I can review in  
3 your analysis, or is it based on some secret information that  
4 you have that I don't get a chance to see? It can't be simply  
5 because member A believes this because they were on the  
6 commission. It's got to be, OK, what was before the commission  
7 that would lead a reasonable person to come to that conclusion.

8 MR. CARTER: Correct, your Honor, and those materials  
9 are in the record. The memoranda for the record, for instance,  
10 of the interviews of Bayoumi, Thumairy and Osama Basnan are in  
11 the record. They detail the specific factual allegations about  
12 the series of interactions between these parties. In addition,  
13 they make absolutely and abundantly clear that the 9/11  
14 Commission concluded that Thumairy lied systematically  
15 throughout his interview, as did Basnan, and that Bayoumi also  
16 lied on key points. And while the 9/11 Commission may have  
17 declined to draw any inferences from that, as an evidentiary  
18 matter even at trial a fact finder in a civil proceeding would  
19 be able to infer from the witnesses lying about a material fact  
20 evidence of guilt, affirmative evidence of guilt, and so the  
21 fact that they lied about these details in an effort to conceal  
22 their activity is itself affirmative evidence that is also in  
23 the record, your Honor.

24 THE COURT: All right. Let's assume that I give  
25 weight to all of the factual allegations and reasonable

1 inferences. My assessment, and you can tell me whether you  
2 disagree with it, is that I have to determine whether or not  
3 there are employees or officials of the Saudi Arabian  
4 government in the United States who were involved in tortious  
5 acts, those acts are entirely within the United States and that  
6 those tortious acts were not discretionary acts and those  
7 tortious acts caused the injuries that are at issue here. Is  
8 that a mischaracterization of what I'm assessing, or how would  
9 you differ with that?

10 MR. CARTER: Your Honor, I would differ only on two  
11 relatively modest points. The Second Circuit's entire tort  
12 rule does not require that every aspect of the tortious  
13 activity occur in the United States.

14 THE COURT: Then why do they call it an entire tort?

15 MR. CARTER: Look, your Honor, I think it evolved in  
16 other places.

17 THE COURT: They don't say substantially tort rule,  
18 they say the entire tort rule.

19 MR. CARTER: Your Honor, the specific language of  
20 their decision is rather conspicuous on this when they issued  
21 the Saudi Joint Relief Committee and the Saudi Red Crescent.  
22 They made clear that the decisions turned on the fact that none  
23 of the tortious acts of those defendants were alleged to have  
24 occurred in the United States, and they specifically  
25 highlighted with italics that their decision was issuing only

1 because every aspect of the tortious activity had occurred  
2 abroad.

3 THE COURT: I know, but you're not arguing that the  
4 rule is that as long as some of the tortious acts were  
5 committed in the United States that's sufficient to meet the  
6 entire tort rule.

7 MR. CARTER: Your Honor, if we demonstrate that an  
8 agent of the Saudi government committed a tortious act in the  
9 United States, that is sufficient for purposes of the  
10 territorial requirement of the tort exception as identified by  
11 the Second Circuit.

12 THE COURT: It depends on what you define as the  
13 tortious act. It can't be "a" tortious act. It has to be  
14 "the" tortious act, doesn't it?

15 MR. CARTER: There could be multiple tortious acts,  
16 your Honor. Let me give you an example.

17 THE COURT: The tortious act that you're suing on.

18 MR. CARTER: Correct, your Honor.

19 THE COURT: What's the tortious act that is involved  
20 here? I assume that you mean the tortious act is that they  
21 provided financial support to the terrorists who were involved  
22 in the 9/11 attacks. I'm sorry. Let me restate that. They  
23 provided material support to the individuals who perpetrated  
24 the terrorist attacks on 9/11. That means that that entire  
25 act, under the entire tort doctrine, must have occurred in the



1 United States. So as part of your tort, one would argue that  
2 it can't be that they provided material support to the 9/11  
3 attackers in the United States and outside the United States.  
4 That can't be the tort. The tort has got to be limited to that  
5 they provided material support, they directly provided material  
6 support in the United States to the 9/11 attackers, and they  
7 did so while they were employees or officials of the Saudi  
8 government. Would that be an incorrect statement?

9 MR. CARTER: Your Honor, the entire tort rule requires  
10 an entire tort in the United States. It doesn't require every  
11 tort committed by the foreign state in furtherance of the act  
12 to have occurred here, and there's a reason why. To hold  
13 otherwise would encourage bad actors of this nature simply to  
14 slip across the border to Canada, engage in one act of support  
15 of the terrorist attack and come back and then claim immunity  
16 because they also drove over the border.

17 THE COURT: I understand what you're saying, but it  
18 seems to me that it does require that the claim on which you're  
19 suing can't be the claim that they provided material support  
20 outside the United States. Now, that may be evidence of the  
21 material support that you're saying that they provided in the  
22 United States. It doesn't make it irrelevant. If you say I  
23 have significant evidence that they provided material support  
24 outside the United States to the hijackers, sure, that could  
25 further a determination that they did provide material support

1 for the tort that you're suing on in the United States, but it  
2 can't constitute the tort you're suing on in the United States.  
3 What the court has said is that the tort that you're suing on  
4 in the United States has got to be wholly, irrespective of  
5 whether they did or didn't provide other support also outside  
6 the United States, the claim has to be one in which they were  
7 involved in a tortious act in the United States. Your claim  
8 has got to be, now, your evidence can be more, but your claim  
9 has got to be that they provided material support in the United  
10 States to these hijackers, and it can't be that, Well, even if  
11 I can't prove that they provided support in the United States,  
12 if I prove that they provided support outside the United  
13 States, then I have a claim; or if your claim necessarily has  
14 to be that they provided material support in and outside the  
15 United States, that's not a sufficient claim. That's not an  
16 actual claim. The claim has got to be that they provided  
17 material support in the United States. Would you agree with  
18 that or disagree?

19 MR. CARTER: Your Honor, I think the issue is that for  
20 purposes of the present motion, the question is whether or not  
21 the government of Saudi Arabia has carried its burden to  
22 demonstrate that we have not adequately alleged that a  
23 government agent committed a tort in the United States.

24 THE COURT: And the tort that's at issue has to be the  
25 tort that their acts were entirely in the United States.

1 MR. CARTER: It has to form a basis of the claim that  
2 we are pursuing. The question that your Honor is getting to is  
3 in the event that the Court does conclude that there is an  
4 adequate allegation that they committed a tort in the United  
5 States, what scope of claims then proceed. Is the claim that  
6 proceeds limited only to those tortious acts that were  
7 committed here, or would the plaintiffs be able to pursue  
8 claims related to a broader spectrum of support both within and  
9 without the United States? And, your Honor, I would say that  
10 it's unnecessary to reach that conclusion at this juncture.

11 THE COURT: I agree with you, but that isn't the  
12 issue. The issue is whether or not it is trying to establish  
13 whether the exception to immunity exists, you have to  
14 demonstrate a tortious act that it took place entirely in the  
15 United States. For that purpose, that's where you have to  
16 focus. You can't demonstrate that exception relying on  
17 tortious acts that happened outside the United States, so you  
18 have to say I'm relying on this tortious act, I'm accusing this  
19 person, acting on behalf of the government, of doing this  
20 tortious act in the United States. That's the basis on which I  
21 say there's an exception. The tortious act that you rely upon  
22 to meet the exception cannot be a tortious act that happened  
23 outside the United States. It has to be a tortious act that  
24 you say occurred entirely in the United States. If you say to  
25 me in the United States one of these individuals provided

1 dollars to a hijacker so that the hijacker could carry out the  
2 attack, I would say that that qualifies as a tortious act that  
3 was committed in the United States. If you say to me a charity  
4 gave money to someone that was going to funnel money to the  
5 hijackers, but the charity gave this money outside the United  
6 States, that does not help you in meeting the exception.

7 MR. CARTER: The external acts would not help in  
8 meeting the exception, I think, only for purposes of pleading,  
9 your Honor. They may inform the plausibility of the  
10 allegations relating to the domestic torts, the U.S. torts.

11 THE COURT: They may make it more or less likely.

12 MR. CARTER: Correct, your Honor.

13 THE COURT: And one could consider that, if that's  
14 consistent with the kind of activities happening within the  
15 United States. But the tortious activity you have to rely upon  
16 is in the United States. I'm not sure how you allege that  
17 Basnan and Hussayen are employees or officials of the Saudi  
18 government. I understand your argument about Bayoumi and  
19 Thumairy being employed by the Saudi government, but I don't  
20 understand that there is any fact that would indicate the other  
21 two at the time of their activities were employees of the Saudi  
22 government.

23 MR. CARTER: Sure, your Honor. In the case of Basnan,  
24 the FBI reports that included in plaintiffs' appendix indicated  
25 that they have concluded that he was an agent of the Saudi

1 government in all likelihood being trained to take over  
2 Bayoumi's role.

3 THE COURT: But doesn't he have to be an employee or  
4 an official of the Saudi government?

5 MR. CARTER: Your Honor, I'm using the term "agent"  
6 interchangeably.

7 THE COURT: I'm not, because you can be an agent for  
8 someone under strict agency law and not be an employee. The  
9 statute says they have to be an employee or an official.  
10 That's why I asked. There may have been someone who was a  
11 nonemployee or nonofficial that they solicited to do an act,  
12 but that's not what the statute allows. They may be an agent  
13 in that sense, but if they're not an employee or official, is  
14 it your position that they qualify as meeting the exception,  
15 their conduct qualifies as meeting the exception to immunity?

16 MR. CARTER: Your Honor, I think agents in the legal  
17 sense do bind their principals.

18 THE COURT: I know, but the statute doesn't say agent.  
19 It says official or employee. It says the requirement is that  
20 the action be taken by an official or employee. You don't  
21 agree that that's what's required?

22 MR. CARTER: I'm just suggesting, your Honor, that it  
23 may not be that narrow. For instance, clearly a foreign state  
24 can be held accountable for the actions of its alter ego, even  
25 though they don't mention the term "alter ego" in the tort

1 exception.

2 THE COURT: Because alter ego, even if that is  
3 appropriate, means you are the same as the government. That's  
4 what alter ego means. It means in any context. If you're an  
5 alter ego of the corporation, that means you are the  
6 corporation. This is not what the statute is suggesting.  
7 These individuals aren't alter egos. These individuals are  
8 individuals that you say that you want to attribute their  
9 conduct to the government such that the government is  
10 responsible in a way that it loses its immunity. Doesn't the  
11 statute say to do that, you have to attribute it to agents who  
12 are employees or officials of that government? Is that not  
13 correct?

14 MR. CARTER: Your Honor, I'm candidly not sure whether  
15 or not there's any holding denying the applicability of an  
16 exception where an agent acts, but I think it's relatively  
17 unimportant here because the allegation is that Thumairy is an  
18 employee and official, that Bayoumi is an employee official,  
19 that Basnan was being groomed to take over Bayoumi's job, and  
20 al-Hussayen filed a motion to dismiss in the early part of  
21 these proceedings where he said I was an official of the Saudi  
22 government at all material times and I'm seeking immunity  
23 because the claims arise from activities that I was carrying  
24 out in my role as an official. So that's the basis for arguing  
25 that all four meet that textual requirement your Honor has

1 raised.

2 Your Honor, if I may briefly turn to the kingdom.  
3 First of all, your Honor, once the very well documented and  
4 credited allegations concerning the activities of Bayoumi,  
5 Thumairy and others are credited, the entire tort rule falls  
6 away and the kingdom effectively acknowledges as much in their  
7 brief because they don't argue that they're not, the entire  
8 argument proceeds on the basis that the Court disregard those  
9 allegations. The same thing is true for their discretionary  
10 function argument. They don't try to defend the acts of  
11 Thumairy and Bayoumi in supporting the hijackers as  
12 discretionary activities protected under the discretionary  
13 function exclusion. They simply say the Court should disregard  
14 them entirely, and that's for good reason. Neither Bayoumi or  
15 Thumairy are imbued with the kind of high-level policy-making  
16 decision and authority that the discretionary function  
17 exception was designed to shield. They're operational level  
18 employees and so the discretionary function exclusion isn't  
19 implicated by their conduct here.

20 Additionally, the nature of their conduct, providing  
21 direct aid and support to terrorists, simply can't be  
22 encompassed within the scope of the kinds of policy-making  
23 functions the discretionary function clause was designed to  
24 protect. So the allegations relating to Bayoumi and Thumairy  
25 cause the discretionary function argument to fall away as well.

1           THE COURT: I read that in your papers and I assume  
2     you're alluding to it because they're crimes. I'm not sure I  
3     follow, nor do I see in the cases that you've cited a specific  
4     holding that simply because you commit a crime it falls outside  
5     of a discretionary act analysis. If I give you \$10 and tell  
6     you I need a car for tomorrow and I'm your boss and you take  
7     the \$10 and you put it in your pocket and you go steal a car  
8     and you bring it to me, how is that somehow outside the  
9     discretionary act simply because your stealing the car was a  
10    crime when it was clearly an act of discretion? You made the  
11    decision. I didn't tell you to steal a car. You went out and  
12    stole the car and you brought it to me and now I'm driving  
13    around in a stolen car without knowing it. I'm not even sure  
14    why that would even policywise make sense, but I don't see  
15    anywhere where the court either says specifically or implies  
16    that a person can't exercise discretionary acts because they  
17    are illegal, so therefore, because the discretionary-level  
18    employee has such discretion about how to do it, if they choose  
19    an illegal way to do it, that somehow strips me of my immunity.  
20    I wasn't able to follow that, either the logic or see where the  
21    law says that that's the case.

22           MR. CARTER: Your Honor, that is the case, where  
23    employees of a government engage in acts that are illegal,  
24    they're acting beyond the scope of the discretionary function.

25           THE COURT: Why?



1 MR. CARTER: Your Honor, the Supreme Court held as  
2 much in the context of the Federal Tort Claims Act.

3 THE COURT: The Supreme Court did not say it strips an  
4 organization from immunity.

5 MR. CARTER: Your Honor, they've declined to grant  
6 immunity under the discretionary function exclusion where the  
7 acts committed by the employee are illegal, malevolent or  
8 against fundamental precepts of humanity. That's the language  
9 from the cases. The discretionary function exclusion operates  
10 to restore immunity for a narrow subset of otherwise tortious  
11 acts that involve a government employee's valid exercise of  
12 discretion in high-level policy-making related to economic or  
13 foreign policy. That's not at all what's engaged here.

14 THE COURT: All right. Again, I don't know. I didn't  
15 see in your cases, nor am I aware of any case that address the  
16 issue of immunity and the issue of whether or not the tort  
17 exception would apply that says that you do not have an  
18 obligation to demonstrate that it is a nondiscretionary  
19 decision, you're relieved of that burden because the act that  
20 the employee took that was within their discretion to take, the  
21 act that they took was an illegal act.

22 MR. CARTER: Your Honor, the issue is that implicit,  
23 and one of the requirements of the discretionary function  
24 exception, is that the act has to be of a type the exception  
25 was designed to protect. That's an implicit requirement.

1           THE COURT: No, no. But it's not designed to protect.  
2           That's why I'm not sure I follow that. It's not designed to  
3           protect the act. It's designed to protect the sovereign. If  
4           you want to sue the guy who took the act, that's a different  
5           question, but the question is is it appropriate. The rationale  
6           for the discretionary requirement is that it's not appropriate  
7           to strip the government of its sovereign immunity simply  
8           because one of its employees took a discretionary act which was  
9           not the policy or the direction of the sovereign, and so even  
10          an illegal act, if not more so, is not the policy or direction  
11          of the sovereign when that individual has the discretion. The  
12          fact that they exercise that discretion to do an illegal act,  
13          the question is how does that strip the sovereign of sovereign  
14          immunity. What's the logic behind that? And again, I'm trying  
15          to understand the logic behind it because I understand that  
16          part of your argument, but I would be the first judge to ever  
17          say that, that sovereign immunity doesn't apply because you're  
18          relieved of your burden to demonstrate that this was a  
19          nondiscretionary act simply because you just say that it is a  
20          criminal act. I would be the first judge to ever say that.

21          MR. CARTER: Your Honor, you would not be the first  
22          judge to ever say that.

23          THE COURT: Give me a case.

24          MR. CARTER: Berkowitz.

25          THE COURT: Where they said that in the context of

1 sovereign immunity, that sovereign immunity does not require an  
2 examination of whether the act was discretionary or  
3 nondiscretionary if it is a criminal act. None of the cases  
4 say that, do they?

5 MR. CARTER: Liu certainly says that.

6 THE COURT: In the context of sovereign immunity?

7 MR. CARTER: Foreign sovereign immunity decisions,  
8 Letelier and Liu, two of the decisions that have been cited at  
9 length, both turn on the principle where they involved  
10 extrajudicial killings, participation in extrajudicial  
11 killings.

12 THE COURT: Read me the language that would say that  
13 that is an exception to sovereign immunity rather than the  
14 examination of the discretionary function.

15 MR. CARTER: Your Honor, I don't have the Liu and  
16 Letelier decisions highlighted with that language in front of  
17 me. We can certainly provide it and we can provide a statement  
18 on this issue if your Honor would like. I think it's very  
19 telling, your Honor, that there's no effort on the kingdom's  
20 part in their briefs to defend, and carry their burden as the  
21 party seeking dismissal to defend the actions of al-Bayoumi and  
22 al-Thumairy on the basis of the discretionary function  
23 exclusion. They simply tell your Honor they don't matter and  
24 disregard them, but there's no argument that even if you credit  
25 them, they're discretionary. They don't go and even make that

1 argument because they're cognizant of these authorities.

2 THE COURT: Let's put aside whether or not the acts  
3 that they committed were legal or illegal. Do you agree that  
4 they were discretionary?

5 MR. CARTER: The acts that Thumairy and Bayoumi  
6 committed were not discretionary within the meaning of the  
7 Foreign Sovereign Immunities Act at all.

8 THE COURT: I'm not sure what you tagged on to the end  
9 of it. Why? Because they were illegal? Put aside their being  
10 illegal.

11 MR. CARTER: It also has to involve some valid  
12 policy-making decision grounded in economic, social or similar  
13 policy. There's no suggestion that they were engaging in these  
14 acts on the basis of furthering the kingdom's social policy.  
15 They don't have authority to do those things. The question,  
16 the separate question, your Honor, is whether or not their acts  
17 are attributable to the state.

18 THE COURT: So if the kingdom had someone to run its  
19 charity and that person was told it is your authority to decide  
20 who the appropriate individuals are to give money to, you would  
21 agree if they gave money to an entity and that was not an  
22 illegal act, that that would not overcome sovereign immunity to  
23 be able to sue the sovereign?

24 MR. CARTER: I'm just trying to think through the  
25 hypothetical, your Honor, for a moment.

1 THE COURT: Sure.

2 MR. CARTER: Again, if they're giving to an entity  
3 they perceive to be legitimate and they have no reason to  
4 know --

5 THE COURT: They who?

6 MR. CARTER: The charity is giving to an entity that  
7 they perceive to be legitimate and have no reason and they're  
8 not trying to further a criminal enterprise, I don't think  
9 there would be a basis to suggest that that conduct is in any  
10 way tortious or that it necessarily runs afoul of the  
11 discretionary function in terms of making those decisions.

12 THE COURT: The conduct might be tortious. I'm  
13 assuming that the conduct is tortious.

14 MR. CARTER: It might.

15 THE COURT: I'm assuming that the conduct is  
16 tortious but not illegal. If I gave money to a drunk driver to  
17 drive home, would that be criminal conduct or not criminal  
18 conduct? And I'm just not sure, when you say, oh, because it's  
19 criminal, it changes the analysis. I'm not sure how you get  
20 there.

21 MR. CARTER: Your Honor, the decisions again Letelier  
22 and Liu --

23 THE COURT: I'll look at them up here.

24 MR. CARTER: -- which have said that foreign countries  
25 have no discretion to commit unlawful acts.

1 THE COURT: Is that in the context of stripping them  
2 of sovereign immunity?

3 MR. CARTER: That's in the context of determining that  
4 they were not entitled to sovereign immunity under the Foreign  
5 Sovereign Immunities Act, as well as the USAA Casualty  
6 decision.

7 THE COURT: With regard to a discussion of whether or  
8 not it qualifies as a discretionary or nondiscretionary act?

9 MR. CARTER: Correct, your Honor. USAA Casualty v.  
10 Permanent Republic of Namibia, Liu v. Republic of China and  
11 Letelier v. Republic of Chile all include discussions of this  
12 issue in the context of determining whether or not the  
13 discretionary function exclusion bars jurisdiction.

14 THE COURT: Just give me one second because I thought  
15 I had the cases. Where are you quoting from?

16 MR. CARTER: Your Honor, the exact cite, in the USAA  
17 Casualty case, is 681 F.3d at 113.

18 THE COURT: 113?

19 MR. CARTER: Liu.

20 THE COURT: Just a second. What language did you  
21 quote?

22 MR. CARTER: Your Honor, the decision in USAA Casualty  
23 case involved a finding --

24 THE COURT: Just tell me what language. I have the  
25 decision in front of me.

1 MR. CARTER: It's the language of the decision that  
2 speaks to, where there's an affirmative duty imposed by law for  
3 a party to have behaved in a certain way, a foreign state does  
4 not have discretion to deviate from that.

5 THE COURT: I still don't know what language you're  
6 saying that says that if a person has the authority and is  
7 involved in discretionary acts, sovereign immunity does not  
8 apply if that employee commits, in exercising that discretion,  
9 an illegal act.

10 MR. CARTER: Your Honor, the issue is that the  
11 structure of the tort exception provides there's no immunity  
12 for tort claims arising from the acts of foreign states or  
13 their officials and employees.

14 THE COURT: Right.

15 MR. CARTER: The discretionary function exclusion then  
16 says, but we will restore that immunity.

17 THE COURT: Right.

18 MR. CARTER: In cases in which the employee is engaged  
19 in the performance of an discretionary function.

20 THE COURT: No. You said it incorrectly. Not that we  
21 will restore that immunity. That immunity continues to exist  
22 unless you demonstrate that it's a nondiscretionary act.

23 MR. CARTER: No, your Honor.

24 THE COURT: That's why they call it exception to  
25 sovereign immunity. They presumptively have the sovereign

1 immunity.

2 MR. CARTER: Your Honor, it is their burden to come  
3 forward and demonstrate that the exclusion applies, their  
4 burden to demonstrate that the tort complained of involves the  
5 performance of a discretionary act. So it's their burden to  
6 restore their immunity on that issue. The allegations  
7 demonstrating that law prohibited these persons, these  
8 employees of the government from engaging in the activities  
9 that they performed, affirmatively establishes for the purposes  
10 of the plaintiffs' pleadings that the discretionary function  
11 exclusion does not apply.

12 THE COURT: I'll look at that.

13 MR. CARTER: Your Honor, the language that someone's  
14 just handed me from the Liu decision holds that the  
15 "discretionary function exception is inapplicable when an  
16 employee of a foreign government violates its own internal law  
17 and commits murder." The Letelier decision is "whatever policy  
18 options may exist for a foreign country, it has no discretion  
19 to perpetrate conduct designed to result in the assassination  
20 of an individual or individuals --"

21 THE COURT: Slow down.

22 MR. CARTER: "-- action that is clearly contrary to  
23 the precepts of humanity as recognized in both international  
24 and national law."

25 THE COURT: Could you tell me what page you're quoting



1 from.

2 MR. CARTER: The Letelier quote is from 488 F.Supp. at  
3 673, and the Liu quote is from 892 F.2d at 1431, your Honor.

4 THE COURT: And you began where?

5 MR. CARTER: In Liu, it was the language holding that  
6 the discretionary function exception is inapplicable when an  
7 employee of a foreign government violates its own internal law.

8 THE COURT: I'm sorry. What page?

9 MR. CARTER: I'm sorry, your Honor. I have one of our  
10 briefs.

11 THE COURT: Oh, I see.

12 MR. CARTER: My apologies.

13 THE COURT: I'll just flag the page. I'll go back to  
14 it.

15 MR. CARTER: Your Honor, briefly, with regard to the  
16 defendants' jurisdictional causation argument, here again we  
17 have a problem of the Saudi government simply not engaging  
18 under the applicable standard. Courts, including this court in  
19 its Havlish decision, have recognized that the caused-by  
20 language of the tort exception merely requires a plaintiff for  
21 purposes of establishing jurisdiction to plead some reasonable  
22 connection between the defendants' wrongful conduct and the  
23 resulting injury.

24 Now, the defendants resist that standard citing to a  
25 more recent Supreme Court decision that does not involve the

1 FSIA. It involves a criminal statute, and it did not involve  
2 an interpretation of the exact phrase "caused by." But the  
3 defendants argue that the Supreme Court in that decision  
4 reviewed phrases that they think are similar to the phrase  
5 "caused by" and concluded that they normally require but-for  
6 causation. And the problems here, your Honor, are first, none  
7 of these decisions involve the interpretation of the caused-by  
8 language of the Foreign Sovereign Immunities Act.

9 The additional problem, your Honor, is that those  
10 decisions all involved the interpretation of causation language  
11 in substantive statutes. Burrage was a criminal statute. The  
12 other decisions involved RICO claims and others. The Foreign  
13 Sovereign Immunities Act is a jurisdictional statute, and it is  
14 that principle that lies at the heart of the decisions of the  
15 federal courts that the caused-by language merely requires some  
16 reasonable connection between the act complained of and the  
17 resulting injury. And so plaintiffs more than meet that  
18 requirement here, and this is not based on some unadorned  
19 allegation that the defendants' conduct was a cause of the  
20 September 11 attack; it's rather based on the specific  
21 allegations that describe the importance of the support  
22 provided by the defendants to the success of the September 11  
23 attacks, as, for example, the allegations documenting that  
24 Hazmi and Midhar were ill-prepared for their mission in the  
25 United States and would need assistance in order to get settled

1 and begin carrying out their activities.

2 Now, to quarrel with this is simply to disagree with  
3 the empirical findings of the 9/11 Commission on the point.  
4 It's to disagree with the conclusions of Congress in this very  
5 arena about what kinds of supports are material. They  
6 specifically identify in the Antiterrorism Act, for example,  
7 that providing lodging, transportation, financial services are  
8 forms of material support when given to a terrorist. And so  
9 plaintiffs' allegations more than adequately meet those  
10 standards.

11 Finally, your Honor, I'd just like to briefly address  
12 the claims arising from the activities of the charity alter  
13 egos of the government, and there's a few problems here again,  
14 your Honor. The kingdom has not filed any affidavit or  
15 otherwise raised any competent challenge to any of the  
16 allegations that are offered about the status of the charities  
17 as alter egos and their conduct in supporting al-Qaeda.

18 THE COURT: Doesn't the same rule apply, that that  
19 conduct has to be conduct that took place in the United States?

20 MR. CARTER: Yes, your Honor, and they argue that the  
21 allegations that the charity offices in the United States are  
22 insufficient, but the problem with that, your Honor, is this  
23 Court and the Second Circuit have already concluded otherwise.  
24 The individual U.S. branches of these charities appeared and  
25 filed motions to dismiss. The al-Haramain branch filed a

1 motion to dismiss, the U.S. branch of the International Islamic  
2 Relief Organization filed a motion to dismiss, the World  
3 Assembly of Muslim Youths filed a motion to dismiss, arguing  
4 all of the same things, that the allegations were conclusory,  
5 that there was no allegation to support a causal connection to  
6 the September 11 attacks, and the Court denied those motions  
7 and we've been proceeding with discovery against them since.

8           The Second Circuit likewise reinstated claims against  
9 officials of the U.S. offices of those charities in its 2013  
10 decisions. It reinstated claims against Suliman al-Buthe, who  
11 was an official of the U.S. branch of al-Haramain, and it  
12 reinstated claims of Soulieman al-Ali, who was an official of  
13 the U.S. branch of the IIRO. And they indicated that the  
14 allegations pertaining to their conduct in directing the  
15 terrorist activities of those offices were sufficient to  
16 satisfy the pleading standard they were imposing for purposes  
17 of the personal jurisdiction analysis, which as your Honor  
18 knows, requires a very strong nexus to the September 11 attacks  
19 under the standard the Second Circuit has announced in this  
20 case. And so those factors are all satisfactory.

21           Again, your Honor, the kingdom tries to avoid these  
22 results by arguing that we haven't proven that the charities  
23 are alter egos as a primary matter. The problem with that is  
24 that there's ample evidence in the record, including the  
25 testimony of the plaintiffs' expert, documenting the precise

1 kinds of control activities that are relevant in determining  
2 whether or not an entity is an alter ego of a foreign state,  
3 and this ranges from the fact that they appoint their  
4 directors, provide virtually all of their funding, specific  
5 allegation that the embassies direct the activities of the  
6 charities in the countries outside of Saudi Arabia where they  
7 operate, the specific testimony of employees of the charities,  
8 they viewed themselves to be employees of the government, and a  
9 range of other very highly specific allegations that certainly  
10 give rise to a reasonable expectation that discovery might lead  
11 to relevant evidence, which is the Twombly standard the  
12 defendants themselves cite.

13 THE COURT: It's not clear to me what discovery you  
14 think is going to uncover.

15 MR. CARTER: Your Honor, again, this is a bit of the  
16 issue. If the kingdom had come forward and raised a specific  
17 factual challenge to one of our allegations, we would have come  
18 to the Court and said we want discovery as to that issue that  
19 they're attempting to contest. Now, the question is as the  
20 case proceeds, and counsel for the kingdom is alarmist about  
21 what the discovery might look like with regard to the question  
22 of jurisdiction, if your Honor were to find that a particular  
23 fact that is vital to the resolution of the jurisdictional  
24 dispute was insufficiently developed in the record, let's say,  
25 for example, your Honor concluded that Bayoumi's status as an

1 agent and employee of the government was a critical factor that  
2 seemed undeveloped in the record, and again, we disagree  
3 because it's clear from the record that he is. But even  
4 assuming your Honor thought that was undeveloped, the Court  
5 would then say I want discovery as to that issue, which is why  
6 we framed our request in that way. We don't want pervasive  
7 discovery of every issue pertaining to this for the purposes of  
8 jurisdictional.

9 THE COURT: The Court doesn't want discovery, it's the  
10 party that wants discovery. You present to me what you say is  
11 a significant factual averment from the averment of facts that  
12 you say meets your burden. Either it does or it doesn't. You  
13 don't say to me there's something that you don't know or that  
14 you can't demonstrate because they have the information and you  
15 don't. That's not to say, Well, if you disagree with us, then  
16 just open the door to discovery. That's not particularly  
17 useful for me because I see no basis for further discovery, nor  
18 do you. You say that you have what is sufficient and pretty  
19 much whatever you're going to get. You don't articulate  
20 anything on any issue that you would anticipate that you and  
21 the Court are going to be more knowledgeable about if I end up  
22 disagreeing with you that your 100-page additional averment of  
23 facts, plus the original complaint and what developed over the  
24 last decade, somehow I should think of something that I would  
25 say at this point, well, I think maybe you can find some more

1 information about this or I'll give you jurisdictional  
2 discovery. It seems to me that you haven't even taken that  
3 position. You've taken a fallback decision, that's it. You  
4 say if I lose, give me discovery. That's all you're saying.

5 MR. CARTER: No, your Honor. I think the position  
6 we're taking is that because the kingdom has failed to raise  
7 any competent factual challenge under the standards applicable  
8 in FSIA disputes, our allegations are to be accepted as true  
9 and we think that they are more than sufficient to carry our  
10 burden on every point, and so the appropriate result is for the  
11 Court to deny the motion to dismiss outright on the basis of  
12 the record, and that's a product of their decision not to raise  
13 a competent factual challenge, your Honor.

14 THE COURT: If I say that you are deficient in any  
15 way, I should rather than dismiss just give you discovery on  
16 that issue? That's basically your argument.

17 MR. CARTER: I think that the approach the Second  
18 Circuit undertook with regard to the personal jurisdiction  
19 appeals is instructive on this point. There were a number of  
20 places in which they said that essentially the allegations gave  
21 rise to an inference, for instance, that Dallah Avco had  
22 engaged in tortious activity giving rise to the September 11  
23 attacks and they said we think that discovery as to the nature  
24 of their relationship to Bayoumi might push this over the edge  
25 and establish jurisdiction, they're very close and this might

1 push it over the edge, and so that's the circumstance in which  
2 we'd be seeking discovery, your Honor.

3 THE COURT: If that was my determination, I might give  
4 more serious consideration to giving discovery, but unless you  
5 can articulate for me, either now or then if I decide that it's  
6 insufficient, in what way you think that discovery would be  
7 revealing and determinative and reverse the decision on that  
8 issue, I don't think that you've made a sufficient record now  
9 to simply say that if I lose give me discovery.

10 MR. CARTER: Your Honor, I apologize. I understand  
11 now. Let me give you concrete examples of how discovery might  
12 further inform the record. We know from the 9/11 Commission  
13 report that they had the opportunity to interview Fahad  
14 al-Thumairy, Omar Bayoumi and Osama Basnan and that the  
15 productiveness of that interview was significantly impaired by  
16 the conclusion that those principals in this investigation had  
17 lied to them throughout. There was an additional problem that  
18 Thumairy was sitting next to a representative of Saudi  
19 intelligence who was whispering in his ear throughout the  
20 interview. And so were there any concern in the Court's mind  
21 about whether Bayoumi and Thumairy knew one another and were  
22 working in concert with one another to support the hijackers,  
23 the depositions of those individuals would clearly further  
24 inform the record on this point.

25 THE COURT: Because you think they're going to give



1 you different answers than they gave before?

2 MR. CARTER: I think that they're not going to have  
3 the benefit of having a Saudi intelligence officer whisper in  
4 their ear while they're testifying. I think we're going to  
5 have the benefit of being able to proceed pursuant to the  
6 Federal Rules of Civil Procedure and the protection it affords,  
7 which the commission did not.

8 THE COURT: What is your wishful thinking in terms of  
9 what they would say?

10 MR. CARTER: Your Honor, I think our wishful thinking  
11 is simply to document the denials, for instance, Thumairy's  
12 denials of knowing Bayoumi are demonstrably false based on a  
13 huge spectrum of evidence, which is the conclusion the 9/11  
14 Commission reached as well.

15 THE COURT: How would I anticipate that you're going  
16 to demonstrate that by a deposition of them? They're not going  
17 to break down and confess to you that fact.

18 MR. CARTER: Your Honor, again, the fact finder's  
19 conclusion that they systematically lied on material aspects in  
20 dispute may itself prove to be affirmative evidence  
21 demonstrating their guilt.

22 THE COURT: We already have that. We already know  
23 that.

24 MR. CARTER: Your Honor, I agree with you that the  
25 record establishes that point. I do.

1           THE COURT: Again, you would have to articulate to me  
2 what would be the usefulness of further discovery on this issue  
3 in terms of what you anticipate you hope to find and how that  
4 would supply any missing relevant fact if I were to determine  
5 that this record did not support that assertion.

6           MR. CARTER: Your Honor, let me give you another  
7 example. Again, we've alleged and provide very specific facts  
8 in support of our claim that the charities are alter egos. If  
9 your Honor feels that there is any discrepancy in the record on  
10 that point, discovery concerning the nature of the relationship  
11 of the charities to the government, how money flowed between  
12 them, the role of the government in appointing employees to the  
13 charities, the role of the government in directing how they  
14 carry out their activities would certainly fill up any  
15 potential gaps in that question. It is an issue we've been  
16 attempting to pursue in the discovery as to the charities  
17 themselves, but as Judge Maas could say the discovery as to the  
18 charity has been punctuated by a number of problems.

19           There has been defaults entered, for instance, against  
20 the al-Haramain Saudi headquarters based on discovery  
21 violations. There have been a number of motions to compel  
22 filed by plaintiffs granted as to other of the charities, so it  
23 may very well be that the direct discovery as to the kingdom  
24 would shed light on those issues. But again, your Honor, we  
25 think it more than documented in the record that we carry our

1       burden on that at this stage.

2               Thank you, your Honor.

3               THE COURT: Let me try to figure out how much longer  
4       we're going to go and whether I should give my court reporter a  
5       break.

6               MR. KREINDLER: Your Honor, I just need a couple  
7       minutes. Listening to the dialogue between you and counsel,  
8       there are three points I want to make that will take not more  
9       than five minutes and then five minutes on Iran.

10              THE COURT: I want to give them an opportunity to  
11       reply if they have anything.

12              MR. KREINDLER: Sure. I can sit down now or just say  
13       what I want to say in three minutes on this topic following  
14       some of the comments made by my partner.

15              There are really three points I want to make, your  
16       Honor. There is maybe a dance or a distinction that we've  
17       heard today between the Kingdom of Saudi Arabia and high Saudi  
18       officials and Saudi officials, and the point I want to make is  
19       this, your Honor: 35 years ago, the whole world changed. In  
20       Saudi Arabia, radical fundamentalists took over the mosques,  
21       scaring the Saudi government. There's a revolution in Iran,  
22       the Shah is deposed, radical fundamentalists are in control.  
23       When the Soviet Union invades Afghanistan, radical  
24       fundamentalists eventually defeat the Soviet Union. Ever since  
25       then, in Saudi Arabia, two things have been happening at the

1 same time. The Kingdom of Saudi Arabia depends on us. When  
2 Saddam Hussein invaded, we saved them. We supplied billions of  
3 aid to the Kingdom of Saudi Arabia. At the same time, to  
4 remain in power and for individuals in Saudi Arabia to get  
5 higher positions and higher power, you have to have the support  
6 of the fundamental Islamic mullahs. So at the same time the  
7 country is depending upon us, Saudi officials are pleasing the  
8 mullahs by helping al-Qaeda. That's just a basic fact that  
9 pervades our whole policy.

10 THE COURT: But that's not the record before me on  
11 this motion, nor is that a determinative factor in terms of my  
12 legal assessment.

13 MR. KREINDLER: The point I want to make, your Honor,  
14 is we're here dealing with the motion and the law. In the  
15 political process, while sometimes the government will call the  
16 Kingdom of Saudi Arabia and other times make a distinction  
17 between the kingdom and Saudi officials, that's for political  
18 reasons. Here, as Sean laid out, we've met our burden, I  
19 believe.

20 The second point I want to make is this, very briefly.  
21 Al-Qaeda could not do the 9/11 attack alone. You have these  
22 Saudi terrorists who don't know how to fly, don't speak  
23 English, would stick out like sore thumbs and probably get  
24 arrested long before the attack, unless they had an  
25 intelligence organization, a state supplying support, and Sean

1 has detailed what Saudi Arabia did to supply that cover, that  
2 secret support that let them learn English, live and not be  
3 detected until the support was done.

4 The third point, which bears upon this since we talked  
5 about the entire tort and what's in the United States, I'm kind  
6 of simple about this, Judge. Most of the time when we deal  
7 with entire torts, it's an embassy driver who gets drunk and  
8 hits a pedestrian at an intersection. That's the typical case.  
9 In a case like that, say it was Great Britain's driver who hit  
10 a pedestrian who was drunk, if the plaintiff introduced  
11 evidence that the driver purchased single malt scotch in the  
12 London airport or a year before coming over was arrested for  
13 drunk driving and had all these other instances, the things  
14 that happened outside the United States go to the proof of what  
15 was happening inside the United States, and we've given you a  
16 long record on the support that Saudi Arabia funneled to  
17 al-Qaeda through charities all around the world so that you can  
18 be certain that the entire tort done in the United States that  
19 caused 9/11 was done intentionally, deliberately, as part of  
20 the plot. That's why we've presented all the things outside  
21 the United States.

22 That's all I have to say on this topic. You might  
23 want to hear from Mr. Kellogg and then I just need five minutes  
24 on Iran.

25 THE COURT: Yes, sir.

1 MR. KELLOGG: Your Honor, I'm going to be extremely  
2 brief. I'm not going to respond to Mr. Kreindler's attack on  
3 the kingdom. As your Honor noted, this is a legal issue based  
4 on legal principles, not a political seminar. And I think the  
5 attack on the kingdom, an ally of the United States, is really  
6 quite inappropriate. I want to make only three points:

7 As I predicted, Mr. Carter did not mention the Saudi  
8 High Commission. As I said at the outset, I think it's  
9 absolutely clear that they're not in this case.

10 The second point I wanted to make, Mr. Carter  
11 repeatedly says the Court has to take the allegations as true,  
12 and it is correct that in the In Re Terrorist Attack 2013  
13 decision, the court started out with the general principles  
14 that you look at the allegations in the complaint and you  
15 assume they're true and you take the allegations, but then it  
16 went on to say in the specific FSIA context, where a sovereign  
17 nation denies the allegations and claims immunity, that, and  
18 I'll quote again, "the plaintiff has the burden of going  
19 forward with evidence showing that under the exceptions to the  
20 FSIA immunity should not be granted."

21 Evidence, competent admissible evidence. If  
22 Mr. Carter had any competent admissible evidence, he would have  
23 been waving it around this courtroom. Instead, he has hearsay  
24 statements by people without direct knowledge. He has  
25 anonymous sources contradicted by the findings of the 9/11

1 Commission, the department of justice, the 9/11 staff and the  
2 FBI and the most recent review of the 9/11 report that took  
3 place just in March here and still confirmed that there is no  
4 evidence to support any of these allegations.

5 The third point I'll make, the charities Mr. Carter  
6 mentions that are still before this Court, the IIRO, the Muslim  
7 World League, etc., those are all NGOs. Those are  
8 nongovernment organizations. They did not plead FSIA immunity,  
9 so the fact that the Second Circuit kept them in the case based  
10 on the allegations there is irrelevant to the issue of whether  
11 you can somehow penetrate through these nongovernmental  
12 organizations to try to hold the kingdom accountable for the  
13 9/11 attacks. There are so many tenuous steps in that analysis  
14 that it can't possibly satisfy the FSIA. And the law is quite  
15 clear, you have to show, to establish alter ego status, that  
16 the kingdom is directing the day-to-day operations. There are  
17 no allegations of that. There is no evidence of that  
18 whatsoever.

19 In short, we would ask the Court to finally dismiss  
20 this. Mr. Carter has again made it clear they're not asking  
21 for any particular jurisdictional discovery. They want full  
22 merits discovery. They have not met the burden of going  
23 forward with that.

24 THE COURT: Thank you.

25 MR. KRY: Your Honor, Robert Kry, counsel for Dallah

1 Avco. We weren't expecting to enter an appearance here on this  
2 motion today, but there were a couple statements made during  
3 argument that were prejudicial to my client's interest. I was  
4 wondering if you could indulge us.

5 THE COURT: I'm not sure how it prejudices your client  
6 since your client doesn't have an outstanding motion.

7 MR. KRY: The issue is statements were made suggesting  
8 that Dallah Avco employed Omar al-Bayoumi. He was a technical  
9 or nominal employee, and the only point we wanted to make is  
10 that there hasn't been any briefing on Saudi labor law. We are  
11 working with the Saudi labor expert who we expect to be able to  
12 convince your Honor that there is no employment relationship  
13 there at all. The test under Saudi law is supervision and  
14 direction. There is no conceivable sense in which Dallah Avco  
15 supervised Omar al-Bayoumi's activities or directed his  
16 activities. It was a payroll processing entity and so it paid  
17 the salary and then got reimbursed for it. We expect to be  
18 able to prove that through factual evidence, through expert  
19 testimony. Right now our client is still in discovery, so it  
20 will be a little while before that's teed up, but we would ask  
21 that as the Court considers this motion, we're not weighing in  
22 on any of the issues that Mr. Kellogg raises, but bear in mind  
23 that that is a disputed issue, a vehemently disputed issue,  
24 from Dallah Avco's point of view and we expect to be able to  
25 prove that to the Court.



1 THE COURT: I think that came through.

2 Did you have one last point?

3 MR. KREINDLER: Your Honor, yes. Not on this, on  
4 Iran.

5 THE COURT: Yes.

6 MR. KREINDLER: I just thought I'd take a couple  
7 minutes to spend a little time with the Court on what we're  
8 going to do and why and so you can see our thinking behind  
9 what's coming up with Iran.

10 As your Honor will remember, I think now three years  
11 ago, you entered judgment in the Havlish action against Iran.  
12 You heard evidence that Iran's intelligence organization and  
13 Hezbollah cooperated with al-Qaeda and then Iran provided  
14 assistance to al-Qaeda members transiting Iran before and after  
15 the 9/11 attack. So you entered a liability finding on the 47  
16 death cases in Havlish. You also received damages information  
17 on those cases and awarded amounts between 32 million and 335  
18 million for an aggregate of \$6 billion. There have been  
19 hundreds of other default judgments against Iran, for the  
20 Khobar Towers, the marine barracks bombing. I'm sure your  
21 Honor is aware that in Ashton and in Federal, we moved for a  
22 default judgment on liability only at this point in time, and  
23 I'd like to tell you why we did that and what we hope to do  
24 next.

25 The reason, quite simply, is this. Reading the

1 newspaper, a lot's going to happen between the U.S. and Iran  
2 over the coming months, and our approach to the case all along,  
3 for everything we've been doing for 14 years, and really going  
4 back 27 years to PanAm 103, it's been our approach that we in  
5 court have to act in accordance with the Administration and the  
6 State Department and Congress when it comes to Libya, Iran or  
7 any other country. Just like with PanAm 103, a good result,  
8 which took 20 years, it could only occur when we were on the  
9 same page with Congress and the Administration.

10 What we foresee happening with Iran is this, in now  
11 less than 60 days, Congress is going to vote on the deal, and  
12 most people believe that it will go through. If it goes  
13 through, sanctions will be lifted and money will be flowing to  
14 Iran on oil company deals and others, and you have all these  
15 judgments that could attach those funds to satisfy the  
16 judgments. Because of that, personally, I, my colleagues and  
17 the other lawyers who are involved with Iran all think that  
18 there may be an effort in the future to resolve cases against  
19 Iran so that you don't have judgment creditors seeking to  
20 interfere in oil contracts and other things. The reason we've  
21 moved for liability only at this point in time is twofold. If  
22 we sought large damage awards, in Ashton, we have 857 deaths,  
23 1,750 injuries, and if we do the Havlish sort of math, that  
24 could result in \$150 billion in judgments against Iran, and  
25 we're cautious because we don't want to do something at this

1 point in time that might interfere with diplomacy with Iran and  
2 what the Administration and State Department want to do. So  
3 that's why we're doing it in two phases, for liability only, and  
4 we're hoping that when your Honor has the time you'll be able  
5 to enter that default on liability only because it's the exact  
6 evidence you've already heard on Havlish.

7 Now, the other component of what we're doing is this.  
8 In Havlish, you dealt with 47 deaths. In Ashton, it's 850, 20  
9 times the amount, and almost 2,000 injury cases and we don't  
10 want to overwhelm the Court and ourselves with huge damages  
11 information, particularly when we expect that all the terror  
12 cases will eventually be resolved on an equal per-decedent  
13 basis, like the \$10 million in PanAm 103. So you have the  
14 default on liability and we hope that when that's entered, we  
15 will be before you with the default on damages, but our present  
16 thinking, both to accord with what we see diplomatically and,  
17 frankly, what's most effective, is to present something where  
18 we ask for a default on a common number, if you take the lowest  
19 consortium award in Havlish and pain and suffering and interest  
20 and do something like that across the board. So while we're  
21 here together, I thought I'd take these five minutes just to  
22 lay out what we've done, what our present thinking is and what  
23 we anticipate doing over the coming months.

24 THE COURT: Thank you. What I'm going to do is let's  
25 go ahead and schedule our next conference, say, for January 14.

1 We'll see where we are. Continue to work with Magistrate Judge  
2 Maas in moving forward. We'll move these motions out of the  
3 way and then we'll see where we are. In that time if we need  
4 to meet before then, just send me a letter and quick response  
5 and we can convene before then. But otherwise, we'll  
6 anticipate a January 14 conference at 10:30, unless there are  
7 no issues to address at that time.

8 Thank you, everybody.

9 (Adjourned)